Petition

81-823

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No. ____

IN THE

Supreme Court of the United States

October Term, 1981

THE HON. DICK THORNBURGH, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, et al., Petitioners,

v.

MARY McMULLAN, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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November 2, 1981

PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA, PA

QUESTIONS PRESENTED

1. Whether Governor Thornburgh's attempt to eliminate an inefficient method of registration of vital statistics in the Commonwealth of Pennsylvania was properly obstructed by a United States District Court on the ground that the Governor's reform plan involved dismissal of political appointees as part of a system which created an unnecessary cost and expense to the public.

2. Whether elimination of positions of public employees for purposes of governmental efficiency, which necessitated discharge of incumbents who were affiliated with one political party, violated the principles in *Elrod* v. *Burns* and *Branti* v. *Finkel* that political beliefs may not be the "sole ground" for discharge.

3. Whether dismissals of public employees for valid governmental purposes violated the First and Fourteenth Amendments solely because those employees were affiliated with one political party, particularly when the Governor's reform plan called for their dismissal in any event.

4. Whether the trial court properly refused to permit defense counsel to cross-examine a newspaper reporter on the reporter's notes of an interview with the petitioner Governor Thornburgh, after the reporter on direct examination had testified as to the accuracy of his article in the newspaper and the source of the information was known.

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MARY MCMULLAN, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Dick Thornburgh, who is the Governor of the Commonwealth of Pennsylvania, Marie E. Rhoads, Betty L. Hoy, Joseph M. LeBoffe, Doris A. Kissinger, Thomas Tornetta, Marjorie A. Fenstermacher, Arlene W. Kriwasch, Margaret W. Caldwell and Paul Hunsicker respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 4, 1981. Respondents are Mary McMullan, Angelina Aloi, Doris Burleson, Theresa A. Duffy, Carmel Clay, Molly M. Kavash, Mary H. Nevin and Joann King.

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B. The District Court created a new standard of causation which conflicts with the principles of *Mt Healthy City Board of Educ.* v. *Doyle, Elrod* and *Branti*. 7

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II. The Trial Court erroneously refused to permit defense counsel to cross-examine a newspaper reporter on the reporter's notes of an interview with the petitioner Governor Thornburgh, after the reporter on direct examination had testified as to the accuracy of his article in the newspaper and the source of the information was known. 9

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CITATION OF OPINION BELOW

The Judgment Order of the Court of Appeals for the Third Circuit, not yet reported, appears in the Appendix hereto (Appendix 20a). No opinion was rendered by the Court of Appeals for the Third Circuit, which affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania whose opinion is reported at 508 F. Supp. 1044 (E.D. Pa. 1981), and appears in the Appendix hereto (Appendix 1a).

JURISDICTION

The case was argued before a panel of the Court of Appeals for the Third Circuit on August 4, 1981. The judgment of the Court of Appeals for the Third Circuit was entered on the same date. This petition for writ of certiorari was filed within 90 days of the date judgment was entered by the Court of Appeals for the Third Circuit. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution Amendment XIV, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the law.

United States Code, Title 42 §1983:

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

25 P.S. §2374 (1963):

§2374. Political assessments and contributions forbidden in certain cases.

It shall be unlawful for any political committee or any member, employe or agent thereof, or for any public officer or employe, or any other person whatsoever, directly or indirectly, to demand from any public officer, subordinate or employe holding any office or position of honor, trust or profit under this Commonwealth, or otherwise engaged or employed in the service of the Commonwealth, or employed by, or in any way engaged in the service of, any political subdivision, or from any person receiving any public assistance whatsoever from the Commonwealth or the United States, directly or through employment on public works, or any person, association or corporation desiring or having a contract with, or a certificate, license or permit from, the Commonwealth or any political subdivision, any assessment or percentage of any money or profit, or their equivalent in any thing of value, with the understanding, express or implied, that the same may be used or shall be

used for political purpose; Provided, however, That nothing in this act contained shall be construed to prohibit voluntary contributions to any political committee or organization for legitimate political and campaign purposes to the extent such contributions are not prohibited by law.

Vital Statistics Law of 1953
35 P.S. §450.101 *et seq.* (1977) (Appendix 22a).

STATEMENT OF THE CASE

The facts material to an understanding of the issues involved are as follows:

Pennsylvania had established, under the Vital Statistics Law of 1953, a system of registration of births and deaths. Pursuant to the Law, the Department of Health divided the state, other than Philadelphia and Pittsburgh, into 339 districts and appointed a local registrar in each district. Local registrars fill in simple forms with data concerning births and deaths which are then mailed to the Department of Health. They also certify death certificates which have been prepared by funeral directors. Their functions are simple and ministerial.

Local registrars receive a fee for each birth certificate and certified copy of a death certificate. In this manner the registrars, respondents herein, had been able to collect between approximately $4,000 and $20,000 annually. The job is a political sinecure, very little work for substantial remuneration.

The registrars perform an unnecessary function because the information concerning births and deaths could be as easily transmitted directly to the Department of Health rather than through the registrars. That system has been operating effectively in Philadelphia and Pittsburgh.

Abolition of the local registrar system would save the Commonwealth $1.8 million annually, since the Department of Health could handle all 339 local registrars' activities with five additional short term and three additional permanent employees. In addition, elimination of the system would

improve operating efficiency. For example, authorizing a funeral director to prepare the burial permit as well as the death certificate would eliminate the trip to the local registrar.

Moreover, studies and investigations by the Thornburgh Administration revealed that the local registrar system was subjected to political abuses, such as macing,[1] involving strong pressures for financial contributions to the political party by incumbent officeholders.

Governor Thornburgh's ultimate goal was and is the complete abolition of the system, thus eliminating an unnecessary bureaucratic governmental tier. Accomplishment of this goal required amendment of the Vital Statistics Law of 1953. However, the Governor was faced with a Democratically controlled State Senate, which had clearly indicated that it would not cooperate with him in the abolition of jobs held by Democrats. If the positions were occupied by Republicans, the Governor could establish the reform.

As a first step, the Governor replaced Democratic registrars with Republicans in two counties, which were chosen because they were believed to be the locales of the worst patronage abuses in the Commonwealth.

The sponsor of the legislation to abolish the local registrar system stated that the discharges had been made so that the legislation might be approved by the State Senate. Indeed, the Trial Court found as a fact that the discharges "were perceived by . . . the Governor as a first step in a reform program of substantial dimension" (Appendix 10a).

Accordingly, the eight respondents, local registrars in the two counties, were notified of their dismissals by letter dated August 28, 1979 to be effective September 11, 1979. They were replaced by Republicans.

Eight[2] former Local Registrars of Vital Statistics of the Department of Health of the Commonwealth of Pennsylvania

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[1]Macing is a crime under Pennsylvania law. 25 P.S. §2374 (1963).

[2]Originally there were ten plaintiffs, but two plaintiffs declined to prosecute.

(respondents herein), commenced this action in the United States District Court of Pennsylvania on September 24, 1979. The petitioners herein are the Honorable Dick Thornburgh, Governor of the Commonwealth of Pennsylvania, and nine incumbent local registrars.[3]

Respondents' Complaint, as amended, asserted that respondents' commissions as local registrars had been revoked solely because of their political affiliation with the Democratic party in violation of their First Amendment rights as established by *Elrod* v. *Burns*, 427 U.S. 347 (1976) and *Branti* v. *Finkel*, 445 U.S. 507 (1980). Respondents claimed their cause of action arose under Section 1983 of Title 42 of the United States Code and jurisdiction was asserted under 28 U.S.C. §§1331 and 1343. Respondents requested injunctive relief ordering that they be reinstated to their former positions as local registrars. Petitioners contended that the respondents were dismissed to enable Governor Thornburgh to effect the abolition of the local registrar system, an inefficient and obsolescent system.

The District Court of the Eastern District of Pennsylvania, per Judge Pollak, on December 5, 1980, issued a bench decision[4] in which it was determined that respondents had been unlawfully dismissed. On December 18, 1980, the District Court ordered respondents reinstated, but stayed its order during the pendency of petitioners' appeal.

An appeal from the decision and order of the District Court was noticed, and argument before a panel of the Court of Appeals for the Third Circuit (Chief Judge Edward D. Re, and Judges Ruggero J. Aldisert and Joseph F. Weis, Jr.) took place on August 4, 1981. The court affirmed the judgment of the District Court without opinion (Appendix 20a).

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[3]Respondents' replacements as local registrars were ordered joined on the ground that they were necessary parties to this action.

[4]On March 4, 1981 the District Court issued a formal written opinion (Appendix 1a).

REASONS FOR GRANTING THE WRIT

I. The decision below is inconsistent with First Amendment principles as interpreted by this court in *Elrod* v. *Burns* and *Branti* v. *Finkel*.

A. The Court below erroneously held that local registrars, respondents herein, were discharged unlawfully because of the First and Fourteenth Amendments, despite the finding of fact that the dismissal was motivated in good faith for the purpose of abolishing the data collection system of which the discharged local registrars were a part.

The holding of *Elrod* v. *Burns*, 427 U.S. 347 (1976) may be found in Justice Stewart's concurring opinion, the narrowest ground on which five justices agreed. Justice Stewart stated:

> The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatended with discharge from a job that he is satisfactorily performing upon the *sole ground* of his political beliefs. I agree with the plurality that he cannot.

427 U.S. at 375 (emphasis supplied). The recent case of *Branti* v. *Finkel*, 445 U.S. 507 (1980) restates and reaffirms that a discharge is invalid under the First Amendment when an employee is discharged solely because of his political affiliation.[5]

In this case, the District Court found that two concurrent factors brought about the discharge, "partisan political advantage in the conventional sense *and* the Governor's reform program" (Appendix 12a). (Emphasis in original.)

[5]Once a discharged governmental employee makes a showing that he has been discharged solely because of his political affiliation, the ultimate inquiry is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti* v. *Finkel*, 445 U.S. at 518.

Although he did not determine which was paramount, he held "both were operative" (Appendix 12a). It is clear that respondents had been removed as part of the reform of the local registrar system, and only incidentally because they were Democrats. The Court found that the Governor relied upon reports and studies recommending that modification of the system would be more economical and efficient. It follows, therefore, that elimination of the unnecessary registrar job was justified. In that sense the requirement of *Elrod* and *Branti* that an employee may not be dismissed solely for political reasons was satisfied.

The key to *Elrod* and *Branti* is the impermissible interference with political rights and association. It is submitted that the holding by the Trial Court does not further the purpose behind the rule of *Elrod* and *Branti*, because there has been no attempt by the Governor to interfere with respondents' political affiliation. To the contrary, the Governor's aim was and is to abolish the entire patronage system of local registrars within the Commonwealth and dismiss all local registrars.

B. The District Court created a new standard of causation which conflicts with the principles of *Mt. Healthy City Board of Educ.* v. *Doyle, Elrod* and *Branti*.

The District Court's opinion is inconsistent with the Supreme Court's mandate in *Elrod* and *Branti* and the rule of *Mt. Healthy City Board of Educ.* v. *Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy* the Supreme Court stated that a discharged teacher could not prevail merely by showing that the exercise of his First Amendment rights played a substantial part in his dismissal. *Mt. Healthy*, 429 U.S. at 285. The Supreme Court held that even if the exercise of constitutional rights was a substantial factor in an employee's discharge, the public employer could still prevail by showing that the employee would have been dismissed in any event for reasons not constitutionally flawed. Thus *Mt. Healthy* stands for the

proposition that the employee's claim must fail if the discharge would have occurred in the absence of the unconstitutional reason.

In *Mt. Healthy*, causes arising out of two separate incidents led to the discharge. *Elrod* and *Branti*, on the other hand, concerned one incident and in that connection emphasized that the employee would have to demonstrate that there was only one reason—political affiliation—for the discharge. The District Court erroneously attempted to distinguish factual patterns involving one or more incidents. It established a new test. It held that, where a valid justification for a discharge rests upon a constitutionally invalid reason of political affiliation, causation becomes irrevelant and the discharge must fail. It contended that the *Mt. Healthy* causation principle only applied if there were two independent events leading to the discharge, but was inapplicable if there was only one incident. But *Mt. Healthy*, *Elrod* and *Branti* are not supportive of this rationale. Functionally, it should make no difference so long as the discharge would have been made irrespective of political considerations. Thus, for example, if a public employer abolished a job for reasons of economy and in doing so eliminated some political patronage of the opposite party, would not the test of *Elrod*, *Branti* and *Mt. Healthy* apply? The answer is self-evident. The purpose of the *Branti* rule is to undercut the patronage concept, but not at the expense of other valid governmental reasons. That is the lesson of *Mt. Healthy*, *Elrod* and *Branti*.

C. The District Court's decision is in apparent conflict in principle with *Arlington Heights* v. *Metropolitan Housing Development Corp.* which requires a showing of intentional discrimination.

Mt. Healthy, in addition to indicating that plaintiff had to show that his constitutionally protected conduct was a "motivating factor" in the decision to fire him, referred to the need to establish intent, relying upon *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 287

n.2 (1977). Thus, the Court held that the plaintiff must show intentional discrimination. *Tanner* v. *McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1975 (1981). In the instant case, the District Court found both that petitioner Thornburgh's goal was to reform the system of data collection, that there was no reason to suppose that defendent was "interested in . . . interfering with the political activity of the plaintiffs. . . ," (Appendix 15a), and that he "credit[ed] the good faith" of the Governor (Appendix 14a).

With such findings of fact, respondents failed to meet their *Mt. Healthy* burden of showing purposeful discrimination.

II. The Trial Court erroneously refused to permit defense counsel to cross-examine a newspaper reporter on the reporter's notes of an interview with the petitioner Governor Thornburgh, after the reporter on direct examination had testified as to the accuracy of his article in the newspaper and the source of the information was known.

Harold D. Ellis, a reporter for the Delaware County Daily Times, voluntarily testified at the request of respondents as to the accuracy of a quotation he publicly attributed to Governor Thornburgh in an article published in the paper on September 6, 1979. Respondents relied heavily on this article and on Ellis' authenticating testimony throughout these proceedings.

Ellis asserted on direct examination that the quotation was accurate, and, by implication, not misleadingly taken out of context. Upon cross-examination Ellis, on advice of counsel, refused to produce the notes of Ellis' conversation with the Governor, which notes he had used as the basis for the newspaper article.

The District Court ruled that defense counsel could not have access to Ellis' notes even for the limited purpose of determining the accuracy of the quotations and whether they were set forth in proper context. Thereupon, defense counsel moved to strike Ellis' testimony on the ground he had been

precluded from effective cross-examination. The Court also denied this motion. Subsequently, the Court admitted into evidence the newspaper article.

Petitioners contend that Ellis should have been compelled to submit his notes for examination to determine whether the quotations in question were accurate and reported in context.[6] Failing that, the District Court should have stricken his testimony since it could not be adequately tested by cross-examination. Finally, since there was no acceptable testimony authenticating and verifying the fact that the quotations were made in the particular context set forth in the articles, the newspaper articles containing them should not have been admitted into evidence and relied upon by the District Court (Appendix 6a-7a).

Reporters, to be sure, have a constitutionally based freedom of the press which may sanction non-disclosure of their sources under certain circumstances. *Compare Riley* v. *City of Chester*, 612 F.2d 708 (3d Cir. 1979) *with Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Even this right, however, is not an absolute right and First Amendment considerations are not always overriding, *United States* v. *Criden*, 633 F.2d 346, 358 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 924 (1981), even in civil cases. *Garland* v. *Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). This case, of course, does not deal with compelling the disclosure of sources. The source for the quotation proffered was identified in the article. Cases protecting disclosed, self-confessed sources are rare, and the Court of Appeals for the Third Circuit recently held that the party seeking information had a far lesser burden "to obtain the reporter's version of a conversation already voluntarily disclosed by the self-confessed source than to obtain the identity of the source itself." *Criden*, 633 F.2d at 358.

Where the newspaper reporter has opened the door, he cannot properly hide behind any self professed privilege. Judge Rambo, in her concurring opinion in *Criden*, enunciated the correct principle:

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[6]It might also be noted that Ellis never moved to quash the subpoena demanding production of the notes.

> I would look to the present state of expectation of confidentiality. If that expectation no longer exists, I would hold that the [reporter's] privilege no longer exists.
>
> In the case before us, Peter Vaira disclosed his contacts with . . . [the reporter] and testified. . . . If his communication with her was initially confidential, it was no longer confidential when she took the stand. . . . [A]ny privilege which may have existed evaporated.

Id. at 361 (Rambo J., concurring). Underlying Judge Rambo's argument is the basic precept that a privilege belongs to the communicant: to the client, not the lawyer, and the patient, not the doctor. If a reporter seeks a privilege with respect to confidential sources, that privilege is granted only to avoid the chilling effects upon communications to the media that would occur if the communicants feared disclosure of their identities. If the source does not seek protection or is already disclosed, the reason for the privilege's existence ceases, and so should the privilege, which, after all, is an impediment to the search for truth.

Thus, if petitioner's analysis were to stop here, this Court would be fully justified in holding that the production of Ellis' notes should have been compelled (or, in the alternative, that his testimony should have been stricken, thus leaving only an unauthenticated, unverified newspaper article which should have been excluded because there was no evidence of the context in which the quotations were set forth).

This case, however, involved other factors which definitively tipped the scales in favor of either disclosure of Ellis' notes or striking Ellis' testimony. Ellis' counsel was present in Court and had accepted service of Ellis' subpoena duces tecum. Nonetheless, counsel failed to move to quash the subpoena at the opening of the session, or indeed, at any time. No resistance of any sort was offered until counsel for Governor Thornburgh began cross-examination. Pursuant to

F.R.C.P. 45(b) a Motion to Quash must be made "promptly and in any event *at or before* the time specified for compliance therewith. . . ." For Ellis to voluntarily complete direct testimony and then, and only then, to object to defense counsel's cross-examination and move to quash the subpoena, should be held to be a waiver of the right to object to production. The proper procedure would have been to have filed a written motion and given notice to all parties. *Broome* v. *Simon*, 255 F. Supp. 434, 437-38 (W.D. La. 1965); 5A Moore's *Federal Practice* ¶ 45.05[2], at pp. 45-53 to 45-54 (2d. ed. 1981).

Finally, even if the Court below was convinced that the notes should not have been produced, it should have at least stricken Ellis' testimony, and, consequently, excluded the newspaper article in question. The unfairness in allowing Ellis to assert the article's accuracy in all respects, including the context in which the words were spoken, while declining to produce allegedly confirmatory documents, is evident. The undue restriction on defense counsel's cross-examination entirely destroyed defense counsel's ability to cross-examine and present a defense on this issue.

Accordingly, for the reasons set forth above, the District Court erred in either not compelling the production of Ellis' notes or in not striking his testimony and excluding the newspaper article.

CONCLUSION

For the reasons submitted above, this Honorable Court should issue a writ of certiorari to review the Judgment Order of the Court of Appeals for the Third Circuit affirming the opinion of the District Court of the Eastern District of Pennsylvania.

RESPECTFULLY SUBMITTED,

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November 2, 1981

APPENDIX

MARY MCMULLAN et al.

v.

THE HON. DICK THORNBURGH.

Civ. A. No. 79-3431.

United States District Court,
E. D. Pennsylvania.

March 4, 1981.

OPINION*

LOUIS H. POLLAK, District Judge.

This proceeding commenced in 1979 and was an application brought by numerous persons who had served as local registrars within the Pennsylvania Department of Health, until they were discharged by the Secretary effective September 11, 1979, for reinstatement in the positions from which they had been discharged. The principal ground for the lawsuit was the contention under Section 1983 of Title 42 of the United States Code that the discharges violated the constitutional rights of the several plaintiffs in that they had been removed from their public offices for the reason that they were Democrats and that such a ground for removal was a transgression of the plaintiffs' rights to untrammeled political association as most particularly recognized by the Supreme Court of the United States in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and reaffirmed by the Supreme Court, several months after this litigation was commenced, in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

A secondary ground for the plaintiffs' lawsuit was an allegation that the discharge without a hearing was, as to

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*This opinion is a modestly-edited version of the transcript of my bench opinion of December 5, 1980. One purpose of the editing has been to eliminate (a) typographical and punctuation errors, and (b) mistakes of syntax. A second purpose has been to clarify obscure passages by excision and/or amendment. To the extent of the editing, this version, and not the bench opinion as transcribed, constitutes my ruling.

each of the plaintiffs, a denial of procedural due process rights in contravention of the Fourteenth Amendment. A tertiary ground was that as a matter of Pennsylvania state law the plaintiffs could not be discharged except "for cause" under the Commonwealth statute which provides the legislative rubric for local registrars, namely, Act No. 66, designated the Vital Statistics Law of 1953, and no such cause as the statute contemplated was demonstrated by the discharging authority, Secretary of Health Gordon K. MacLeod. These secondary and tertiary claims have not been pressed in the course of the proceeding which has focused on the claims arising under *Elrod*.

What commenced as an application for a preliminary injunction was translated on the court's motion into an application for a permanent injunction. Since the inception of this litigation, numerous defendants have been added at the instance of the court, those defendants being the persons who have been appointed to the various local registrarships made vacant by the discharge of the several plaintiffs. I pressed for the addition of these parties defendant because it appeared that in fact, whether or not in law, the incumbents who have now held the positions of local registrars since September of 1979 had a strong interest in the outcome of this litigation which ought to be protected to the extent possible by their inclusion in the proceedings going forward in this courtroom.

In the Spring of 1979, shortly after Governor Thornburgh's administration came into power in Harrisburg, the Pennsylvania Department of Health produced an extended study of the system of vital statistics governed by the Department of Health. That report, made to Deputy Secretary Welch and dated April 24, 1979, focused specifically on the system of local registrars established by Act No. 66. Under Act No. 66, local registrars appointed by the Secretary of Health for each registration district throughout the state are responsible for the filing of birth certificates and of death certificates and the issuance of burial permits. In those situations where there is a question as to the cause of death as, for example, where no physician was in attendance in the

context of the last illness or where the circumstances surrounding the death suggests violence or other suspicious activity, local registrars are responsible for notifying the coroner so that appropriate inquiry can be made. And the registrars, of course, are also responsible for seeing to it that copies of the certificates are transmitted to the Department of Health for central record keeping.

Local registrars are compensated on a fee basis per certificate filed. When Act No. 66 was enacted the fee was 50 cents per certificate. The fee has now risen to a dollar per certificate. There is a statutory ceiling of $20,000 on the amount which any single local registrar may be compensated; and there are substantial variations in the actual amount of compensation for the not surprising reason that different registration areas have enough differences in population so that the numbers of births and deaths to be recorded and certified vary so significantly as to produce quite different amounts of compensation.

It is, therefore, the fact that among the group of plaintiff former registrars, compensation in 1978, the last full year in which the plaintiffs served in their official posts, ranged from the statutory high of $20,000 down to a low of $4,300.30. The local registrars—these plaintiffs and local registrars generally—have Social Security deductions taken out of their compensation and W–2 forms are filled out by the Commonwealth. They are within the embrace of the workmen's compensation system, though it appears the matter was somewhat in dispute as little as a year ago. They also seem to be covered by unemployment compensation.

I mention these facts because whatever ambiguity there may have been as to the employee-versus-independent-contractor status of persons occupying the post of local registrar seems to be resolved in favor of employee status. The possibility that these persons are not employees within the contemplation of *Elrod* and *Branti* is not something which has been pressed by defense counsel in this matter. To the extent that the issue is thought not to be at rest, I will say here that I conclude as a matter of law that the plaintiffs

are employees of the Commonwealth within the meaning of *Elrod* and *Branti*.

We proceed, therefore, to the facts which give focus to the *Elrod* and *Branti* claims. As I have said, in the spring of 1979 the Department of Health inquired into the operation of the registrar system. The consequent report concludes that the existing system is uneconomical, not particularly efficient, and handicapped by the fact that, by and large, persons have been, under time-worn Commonwealth political tradition, appointed to the posts of local registrars as rewards for loyal political work—that is to say, the local registrar system has been regarded as part of Pennsylvania's patronage tradition. The record in this case as a whole confirms that perception of the registrar system.

The report considers three options: one, is to retain the existing system with its handicaps; the second is to retain the system and replace current registrars—current, that is, as of April 1979—with new appointees; and the third is to restructure the system with a view to having the entire registration process carried on by full-time Health Department personnel in regional offices, which number of offices would probably be increased and perhaps enlarged. The recommendation was against retention of the existing system and it was against retention of the existing system with new appointees.

The second option was thought to involve (1) considerable costs in the payment of substantial unemployment compensation for the persons to be discharged, and (2), as the report puts it, the "continued existence of a highly political, difficult to control system," which was a feature of the existing system noted under the first option. So the report opted for the third proposed reform, that is to say, abolition of the existing local registrar system and placing the whole process of registration, certificate filing and distribution, and data collection under the jurisdiction of full-time Department of Health personnel.

In the summer of 1979 some political pressure, most especially from persons of local political consequence in Delaware and Montgomery Counties, was, according to various

Philadelphia area newspapers, being applied in Harrisburg, with a view to replacing local registrars of Democratic sponsorship with loyal Republicans. The press reports indicate that Murray Dickman, Deputy Executive Assistant to the Governor, met on at least one occasion with some of these political personages. Mr. Dickman in his testimony in this court was quite forthright about his very substantial involvement in the entire matter of terminating the several local registrars who were terminated as of September 1979, including these plaintiffs.

Mr. Dickman, as Deputy Executive Assistant to the Governor, was not the formal discharging authority. But, as a senior aide to the Governor, he was in a position, and, indeed, it was part of his appropriate function, to be representing the Governor's wishes in conversations and consultations and memoranda involving the statutory hiring and firing authorities in the Department of Health, the Secretary and Deputy Secretary.

In August of 1979, thirteen local registrars in Delaware and Montgomery Counties received letters dated August 28, 1979, one of which, that written to Mrs. McMullan, I will read into the record. The signing authority is Gordon K. MacLeod, M.D., the Secretary of Health.

> Dear Mrs. McMullan: This is to advise you that your commission as Local Registrar of Vital Statistics is revoked, effective at the close of business September 11, 1979. Your replacement will be Mrs. Marie E. Rhoads, Apartment 8–A, 4800 Township Line Road, Drexel Hill, Pennsylvania, 19026.
>
> Upon Mrs. Rhoads' request, you are instructed to turn over to her all accumulated registered copies of birth, death and fetal death (stillbirth) certificates, with all forms and supplies pertaining to registration, including certified copy death books Nos. 1212301, 1216001, 1228001, 1241001 and 1242801.
>
> Kindly forward any original birth, death and fetal death certificates you may have on hand at the close of business September 11th in the regular envelope provided

for this purpose. Payment will be arranged as soon as possible after completion of a check of the returns for the last month of your service.

Sincerely, Gordon K. MacLeod.

All of the persons who received this cordial letter were Democrats. All of those named to replace the addressees of these letters were Republicans.

Not surprisingly, there was some journalistic inquiry and comment subsequent to the discharge of the registrars. On September 6, *The Delaware County Daily Times* reported a telephone interview with the Governor. The Governor's words as quoted by Harold Ellis of the *Times'* Harrisburg Bureau, the author of the news report, were preceded by the following language of Mr. Ellis: "In contradiction of previous vows to do away with the patronage system, Republican Governor Dick Thornburgh Wednesday appeared to serve notice he wants to get as many active Democrats as possible out of state government.

"Thornburgh gave the warning in defending the replacement last week of 13 Democratic Party workers with 13 Republican Party workers as Registrars of Vital Statistics in Delaware and Montgomery Counties.

"'I do not propose to subsidize [with] public funds the political activity of people dedicated to undermining this administration,' Thornburgh said in an exclusive telephone interview with the Daily Times."

Later on in the column the Governor is quoted as saying: "'Right now we have mostly active members of the opposite party who are dedicated to undermining this administration. Rather than subsidize these activities with public funds, we are replacing some of them with qualified Republicans.'"

At a later point in the article the reporter reports that, "Thornburgh was confident the *Elrod* decision doesn't apply to the registrars.

"'There's no constitutional right to hold a contract with the State.'"

The Philadelphia Inquirer, on September 9, under the by-line of Vernon Loeb, published a further dispatch from

Harrisburg attributing a number of remarks to Mr. Dickman. "'Our concern was not so much eliminating patronage but eliminating abuses,' Dickman said. 'It is not our intention to fund either party from the public coffers, and that particularly goes for the Democrats.'

"'I don't know how we are going to do it, but we are going to look at a reform of the system,' Dickman said. 'It's the kind of thing where you are damned if you do and damned if you don't.'"[1]

The two attributions to Mr. Dickman and Governor Thornburgh were chronologically between the dispatch of the letter of discharge of August 28 and its effective date, namely, September 11.

On October 2 the Governor addressed the Legislature, describing his legislative program. In the course of his address the Governor mentioned as one of the matters to which he attached importance—this is at page 14 of the Governor's statement as published—"Reform of our system of Local Registrars of Vital Statistics." And in the far more detailed "Legislative Agenda for 1979 to 1980" which the Governor transmitted with his address, the Governor had this to say: "The personnel system of state government calls for improvement. For example, I have asked the Department of Health to develop a proposal to do away with the antiquated system of Registrars of Vital Statistics. The administration proposal will be presented at the Legislature later in this session."

Indeed, a legislative proposal was presented to the Legislature later in the session. That legislative proposal is still pending (except that the Legislature has itself, I think, now finally adjourned for this session). The legislative proposal involves some modification in language of Act No. 66, and the proposal has been characterized by those familiar with its genesis and its legislative progress as one which would give

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[1]While there is no proof, other than these newspaper quotations, that the Governor and Mr. Dickman actually uttered these words, I conclude that I have no basis for doubting that the reporters were substantially correct in relating remarks whose authenticity has not, on this record, been challenged by the officials in question.

authority to the Department of Health to abolish the existing registrar system and to bring about a restructuring somewhat along the lines of option three of the April 1979 Department of Health report to which I have referred.

There may well be an open question as to whether legislation is required to accomplish such a restructuring, but that hardly is a question before me. The question which has been urged upon me as something that is appropriate to consider is whether the legislative proposal put before the Legislature in the context of the discharge of registrars who are Democrats and their replacement with Republicans could be said to have been a seriously-thought-out, likely-to-succeed, avenue to reform.

In effect, Mr. Dickman has urged on this court in testimony, and defense counsel has placed great weight on this as a matter of defense, that it is the position of the Thornburgh administration that replacing Democratic registrars with Republican registrars will reduce the interest of Democratic legislators in preserving the existing registrar system since it will, from a Democratic perspective, have lost any particular patronage allure. That accomplishment will, in turn, facilitate, so the contention is, persuading the Legislature as a whole to support Governor Thornburgh's intended reform of restructuring the system by abolition of the existing local registrar structure.

In short, the view is that Governor Thornburgh can reasonably rely on the support of legislators of his own party but operates under the constant drum-fire of strong Democratic opposition—and particularly in a period when one or another or both chambers of the Legislature are in Democratic hands—to reforms which the Governor might want to undertake. So the strategy here was to reduce any significant political investment which the Democrats might have in the local registrar system and thereby create a situation in which the Governor could count on Democrats to be indifferent and Republicans to be supportive—and thereby accomplish his intended reform.

I refer to this at length because, in turn, plaintiffs have urged upon me that such a political strategy is a counsel of the most extraordinary political fragility. In effect, their

view is: Why should Democratic legislators be dazzled by so obvious a stratagem and ultimately lend themselves to a form of political suicide? The issue, though an intriguing one, is hardly of a sort one would want a court to explore, and I have no intention of exploring it further for its resolution is not necessary to the disposition of this case.

It will be apparent, I think, from what I have said up to now that the position of the defense in this case does not controvert the allegation that the plaintiffs, and, indeed, all other local registrars, discharged pursuant to the letter of August 28, were Democrats, and all their replacements were Republicans. On the contrary, defendant acquiesces in this view of the record, which is essentially indisputable, but argues, as I have tried to indicate, that the political affiliation of those discharged was relevant for the reason, and only for the reason, that the Governor and Mr. Dickman and those others helping the Governor in the management of the State's affairs were undertaking through these initial discharges to launch a process which would bring about the long-term reform of the registrar system along the lines suggested almost immediately thereafter by the Governor's address to the Legislature on October 2nd.

Against that, the plaintiffs' position is, in effect, that all the talk about firing Democrats in order to lubricate a reform process is a charade. We have to conclude, the plaintiffs suggest, that the actions taken after September 11, including the address to the Legislature and the filing of a proposed reform bill, were cosmetics which were initiated by the state administration with a view to facilitating defense against this very litigation.

I do not find myself persuaded by either the plaintiffs' view or the defendant's view of the factual record. It seems to me apparent, on the one hand, that plaintiffs are right in inferring from the facts of record that the Governor's people and, indeed, the Governor himself, were aware of the 'political,' in the partisan sense, implications of the local registrar system as it was in the summer of 1979 up to July—the point at which no firm decisions had been made but after which decisions were very quickly made respecting the discharge of

registrars in Montgomery and Delaware Counties. Plaintiffs were Democrats who were appointed to office by the last administration, that of Governor Shapp, and I think it apparent from the press clippings to which I have referred that Mr. Dickman and the Governor were aware of the fact that Democrats were being replaced with Republicans and that that was perceivable as part of a strategy not to continue to fund persons found to be in political opposition.

At the same time, the plaintiffs' perception that the whole reform program was a sham seems to me to be quite clearly contradicted by the fact that, as early as April of 1979, before political leaders in Montgomery and Delaware Counties were beseeching Harrisburg to make room for loyal Republicans in registrarships, the Department of Health, with a view to advising Mr. Dickman and others around the Governor, was seriously exploring the perceived inefficiencies in the existing registrar structure. And I fully credit Mr. Dickman's testimony that it was his understanding as he learned more and more about the registrar arrangements that macing and related political customs involving strong pressures for financial contributions to the party by incumbent office holders were rife among local registrars in general and particularly in Delaware and Montgomery Counties.[2]

My view of the record—and I find this as a fact—is that the discharges memorialized in the letters of August 28 and taking effect on September 11 were discharges which took into account political considerations in the conventional partisan sense but also were perceived by Mr. Dickman and the Governor as a first step in a reform program of substantial dimension.

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[2]I do not make a finding of fact that those practices were, in fact, common in Delaware and Montgomery Counties, let alone that they were more virulent there than elsewhere; nor do I make a finding of fact the other way. The extent of my finding is simply that it was Mr. Dickman's honest perception that local registrars, especially in Delaware and Montgomery Counties, and particularly including the plaintiffs, felt under party pressure to give and did customarily give some measure of financial support to the Democratic Party if they were registered Democrats.

In saying that the discharges took into account partisan considerations, I mean, of course, that those determining on the discharges were aware of the fact that those being discharged were, in the main, Democratic loyalists who were to be replaced by Republican loyalists and that such replacements would clearly be welcomed by local political leaders. In saying that this was also understood by the Governor and Mr. Dickman to be the first step of a major reform program, I mean that the Governor and Mr. Dickman felt in all honesty that an important reform of governmental structure could be facilitated by a process of discharging local registrars, beginning with Democratic office holders.

With that factual predicate, what is the consequence mandated by *Elrod* and *Branti?* The plaintiffs' perception of the facts necessarily leads to a legal conclusion that the discharges were wrongful, that is to say, that they were discharges which were political in the conventional sense clearly at issue in *Elrod* itself and in *Branti*. Under the defendants' perception of the facts, these were not political firings in any sense contemplated by *Elrod* and *Branti* and, indeed, clearly fell outside of the teaching of those cases because those cases insist that political motivation be the "sole cause" of an actionable discharge.

To take the language of Judge Troutman in his recent decision, *Farkas v. Thornburgh*, 493 F.Supp. 1168, 1174 (E.D.Pa. 1980) *aff'd mem.*, 633 F.2d 209 (3d Cir. 1981):

> A political firing violates the interdictions of the First Amendment only when the employing authority dismisses an employee '*solely* for political reasons.' *Branti v. Finkel* [445 U.S. 507], 100 S.Ct. at 1301, *Elrod v. Burns*, 427 U.S. at 350 [96 S.Ct. at 2678]. In other words, an independent justification coupled with a constitutionally flawed reason will not taint the Secretary's decision to terminate plaintiffs' employment. *See Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 [97 S.Ct. 568, 50 L.Ed.2d 471] (1977).

Of course, in defendants' view of the record there was no "constitutionally flawed reason" coupled with an "indepen-

dent justification." There was merely the "independent justification"—the reform program of the Governor.

In the middle view of the facts which I take, there are two concurrent animating factors: partisan political advantage in the conventional sense *and* the Governor's reform program. I will not undertake to determine which of the two was paramount in some quantifiable sense. I think both were operative. I would simply say that it is not, in the nature of things, surprising that in governmental activity one gets two motivations operating concurrently.

In *Village of Arlington Heights v. Metropolitan Housing Development*, the Court said, through Mr. Justice Powell:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.

429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

Defendants insist, however, that *Elrod* and *Branti* focus on the soleness of political motivation as the only operative ground for a plaintiff's success and, indeed, the cases certainly are supportive of that proposition. In *Branti*, Mr. Justice Stevens said this:

> To prevail in this type of an action, it was sufficient, as *Elrod* holds, for respondents to prove that they were discharged 'solely for the reason that they were not affiliated with or sponsored by the Democratic Party.'

445 U.S. 507, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980), *quoting Elrod v. Burns*, 427 U.S. 347, 350, 96 S.Ct. 2673, 2678, 49 L.Ed.2d 547 (1976).

Let me for the moment, though, address the legal issue on the factual assumption urged by defendant—which, as I have indicated, I reject—that the only operative motivation behind the discharge was the Governor's reform program. In that view of the matter, the defendant urges that the political affiliation of the plaintiffs, though taken into account, was simply an instrument to the large reform end and, therefore, so defendant says, we do not have a situation in which the political affiliation of the plaintiffs was the sole cause for

discharge. The cause for discharge in the large sense was the Governor's reform plan, so defendant's argument runs, on the basis of defendant's perception of the record. And taking, *arguendo*, that perception of the record, I want to examine that proposed legal conclusion.

The legal conclusion fails. The legal conclusion—and I would now go back to Judge Troutman's analysis—depends on the proposition that "an independent justification coupled with a constitutionally flawed reason will not taint the Secretary's decision to terminate plaintiffs' employment." *Farkas, supra*, 493 F.Supp. at 1174.

It is my judgment that what we have here is not an independent justification coupled with a constitutionally flawed reason. What we have is an independent justification which rests upon the constitutionally flawed reason of political affiliation. *Mt. Healthy* teaches:

> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he could have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred.

429 U.S. 274, 285, 97 S.Ct. 568, 575, 50 L.Ed.2d 471 (1977).

Justice Rehnquist, who spoke for the Court in *Mt. Healthy*, quite understandably rejects a rule so constructed and comes to a different rule, which is the rule that governs the decision in this case:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire.

> Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Id. at 287, 97 S.Ct. at 576 (note omitted).

The protected conduct in this case is membership in the Democratic Party. It is clear from this record, even on defendant's perception of the facts, that plaintiffs' membership in the Democratic Party was an essential ingredient in the decision to discharge. Had the plaintiffs not been Democrats, it is clear that the plaintiffs would not have been discharged.

Even the assumption that the Governor's laudable reform purpose was the *only* purpose which, in an ultimate sense, animated the discharges does not, in my view, bring this case within the purview of the *Mt. Healthy* dictum, for the reason that the membership of the plaintiffs in the Democratic Party was an integral part of the set of ingredients which led to their discharge.

Defendant makes the further contention that a discharge is not constitutionally flawed unless there is an intention on the part of the discharging authority to prejudice the constitutional rights of the plaintiffs; that is to say, the defendant's view is that a discharge of Democrats in which the political affiliation of the Democratic dischargees was only incidental to the larger purpose of creating a climate in which reform could be accomplished is not a discharge which in any way manifests the Thornburgh administration's hostility to the political purposes and interests of the plaintiffs themselves.

Since I credit the good faith of the Governor,[3] I have no

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[3]My finding, as I have said above, is that reform was only one of two animating purposes. But I want to make it entirely clear that in my perception of the record as one which demonstrates a decision to which both political considerations of the conventional partisan kind and political considerations of a much higher statesmanlike kind contributed, I see no reason not to credit the good faith of the Governor and those planning with him for the long-term reconstruction of the Department of Health.

reason to suppose that the Governor and Mr. Dickman were themselves interested in any narrow political sense in interfering with the political activity of the plaintiffs as individuals. But I think the defendant's legal contention that the intentionality which will create a constitutionally flawed discharge must be an intentionality designed to interfere with the constitutional rights of the plaintiffs is a misconception of what the cases prescribe.

It is true that in *Mt. Healthy* there is reference[4] to language in *Village of Arlington Heights* which might be understood in the sense that defendant contemplates. Within the context of the Court's discussion of the notion of a "substantial" or "motivating" factor there is a reference to footnote 21 in *Village of Arlington Heights*. Footnote 21 reads:

> Proof that the decision by the Village was motivated in part by a radically disciminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of the discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing. See, *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274 [97 S.Ct. 568, 50 L.Ed.2d 471].

429 U.S. 252, 270 n.21, 97 S.Ct. 555, 556 n.21, 50 L.Ed.2d 450.

Defendant's argument essentially is that, by the reference to *Village of Arlington Heights*, the *Mt. Healthy* opinion intended to import into the *Mt. Healthy/Elrod* rubric something cognate with a requirement of a "racially discriminatory purpose" before a discharge could be actionable. It is

[4]424 U.S. at 287 n.2, 97 S.Ct. at 576 n.2.

understandable that the reference can create ambiguities, because in the text of *Village of Arlington Heights* there is considerable discussion by the Court of the requirement in a racial discrimination case of demonstrating that the discrimination complained of was intentional, or that, to use the Supreme Court's language, "invidious discriminatory purpose was a motivating factor . . . ." *Village of Arlington Heights*, 424 U.S. at 270, 97 S.Ct. at 566. One can, I think, find some aura in the term "invidious discriminatory purpose" of an intimation by the Supreme Court that what is necessary in a racial context is a determination that the complained-of state action was not merely racially discriminatory but that it was intended to be so, that is to say, that there was not merely a racial differentiation but that it was a racial differentiation which was made with a hostile eye.

It is my reading of the race discrimination cases that that would be a misconstruction of what the Supreme Court has had in mind. I think the Supreme Court has had in mind only to say that racial discrimination by the State is actionable under the Fourteenth Amendment only if the record demonstrates intentionality in racial differentiation.[5]

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[5]What was particularly at issue in the Supreme Court's discussion in *Village of Arlington Heights* was the difference between racially disproportionate impact and racially discriminatory purpose. Much of the case was a reprise of the Supreme Court's decision the previous term in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), which had explored that very differentiation. *Compare Village of Arlington Heights*, 429 U.S. at 264, 97 S.Ct. at 562, *with Washington*, 426 U.S. at 239, 96 S.Ct. at 2047, *et seq.* I do not read *Washington v. Davis* or *Village of Arlington Heights* as meaning to require more than intentionality before racial differentiation becomes actionable. The pertinent thrust of *Washington v. Davis*, as it reversed the Court of Appeals for the District of Columbia, was simply to reject the proposition that a governmental program's disproportionately adverse impact on a racial minority was sufficient to bring it within the interdiction of the equal protection clause, whether or not there was a demonstration of intentionality on the part of government officers to bring about that disproportionate impact. *Compare, Davis v. Washington*, 512 F.2d 956, 960–61 (D.C.Cir. 1975). It is my understanding of the Supreme Court's cases in the race field that where an official state policy operates explicitly on a racial basis, that by itself at least makes the program constitutionally suspect without any inquiry into

I went into this excursus at some length both because the Supreme Court has cross-referenced *Mt. Healthy* and *Village of Arlington Heights*, two cases decided on the same day, and because Governor Thornburgh has relied importantly on the proposition that he was in no sense activated by any political hostility, in the ordinary partisan sense, to the plaintiffs, in authorizing their discharge. I take the Governor's good faith as a given. But I take the rule of *Elrod* and of *Branti* to be that a governmental decision to discharge public officials, which takes as its predicate their political affiliation, is one which is inconsistent with the First Amendment.[6] It is for these reasons that I conclude that the discharges of these plaintiffs—which discharges were predicated on their political affiliation as Democrats, and on the Republican affiliation of those who would replace them—are constitutionally flawed within the meaning of *Elrod* and *Branti*.

There may seem to be some anomaly in a conclusion that persons who came to hold public office on the basis—apart

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the evilness of the purpose of the discrimination. For example, in *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) which Mr. Justice White discussed, *inter alia*, in *Washington v. Davis*, 426 U.S. at 242, 96 S.Ct. at 2049, the Supreme Court's invalidation of Florida's laws, imposing a heavier penalty on unmarried cohabitation between persons who were of different races than on unmarried cohabitation between persons of the same race, depended in no way on a demonstration that Florida's statute was intended to be in some way hostile to blacks or to whites. So, too, in its cases dealing with segregation in public schools—the cases which, of course, comprise the mainstream of racial discrimination law—the Court has not hesitated to invalidate a pupil assignment statute simply because the statute may have been represented by its sponsors as intended to protect rather than to oppress the black children who were being assigned to schools on a racial basis. Good faith, after all, was part of the unsuccessful defense in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) itself.

[6]This excepts that small group of public officeholders as to whom the Supreme Court has held that their hiring or retention can be geared to political affiliation, given a demonstration—not urged here—that political affiliation serves some substantial governmental purpose attaching to the public office in question. *Branti*, 100 S.Ct. at 1295.

from their assured qualifications for their posts (which posts they have on this record filled faithfully and productively)—of appointment by Governor Shapp as good Democrats, should now be in a position to say to Governor Thornburgh and his administration, "You shall not discharge us on the ground that we are Democrats, notwithstanding that we were appointed to our current positions with that as one of our necessary qualifications." If there is anomaly here, it is built into the constitutional transition which *Elrod* and *Branti* have effectuated between the politics which America has grown up with and the more protected political environment which the First Amendment, pursuant to *Elrod* and *Branti*, now instructs government officials, both federal and state, to establish and maintain.

Elrod and *Branti* are very recent decisions and we are, as a Commonwealth and as a nation, in the process of adjusting to them now; a case of this kind is an element in that accommodation.

Now, the legal conclusion that I have reached means, in my view, that plaintiffs are entitled to an order of reinstatement. Defendant has urged that there is no judicial power to reinstate where the position from which one has been discharged has been filled. In making this argument, defendant relies heavily on a sentence in a recent Fourth Circuit opinion: "Moreover, without the [preliminary] injunction, the government would be free to name a successor to Johnson . . . and Johnson would have no means of being reinstated if he should prevail at trial." *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978). Just what the Fourth Circuit meant by this unelaborated dictum is not clear; the one thing that is clear is that it could not have been intended as a general foreclosure of judicial power to direct reinstatement, since exactly that remedy was sought by the plaintiffs whose cause of action the Supreme Court held to be viable in *Elrod*. *See Burns v. Elrod*, 509 F.2d 1133, 1135 (7th Cir. 1975).

I do appreciate that in this case it has been urged by Governor Thornburgh and by the intervening defendants, the present incumbent registrars, that Pennsylvania state

law permits only one person to be a local registrar in a given region. I'm willing to assume that that is the case and that assumption carries with it the real possibility that an order from this court directing reinstatement of these plaintiffs might result in the dismissal of the current incumbents—persons who are certainly entirely guiltless and have doubtless been performing their duties faithfully and efficiently. But I find no basis for preferring the rights of the now incumbents to the rights of the plaintiffs who, as I perceive the facts and the law in this case, have been deprived of their official positions for the prohibited reason that they are Democrats.

I do not propose in the order of reinstatement which I would make to direct the discharge of those persons who are now incumbents. If that is the consequence of my reinstatement order, that will follow as a matter of Commonwealth determination, not as a matter either of the intention or of the inclination of this court. On the contrary, I would very much hope that the Governor and his administrative colleagues would do their very best to limit the injury to these incumbents who have been performing public service at the instance of the Governor's subordinates since their appointment to the registrarships in September of 1979. But that, as I say, is not a matter before me except to conclude, as I do conclude, that the very real interest that those defendant incumbents have in continuing in office is not an interest which is superior or even equivalent in law to the claim that these plaintiffs have to an order of reinstatement.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1240

McMullan, Mary;
Aloi, Angelina;
Burleson, Doris;
Duffy, Theresa A.;
Clary, Carmel;
Moyer, Arlene;
Kavash, Molly M.;
Nevin, Mary H.;
King, Jo Ann;
Wojton, Dorothy M.;

vs.

The Hon. THORNBURGH, DICK
GOVERNOR OF THE COMMONWEALTH OF
PENNSYLVANIA;
Mac Leod, Gordon, Secty of Health of the
Commonwealth of Pennsylvania;
Welch, Emmett, Deputy Secty of Health of
the Commonwealth of Pennsylvania.

and

Rhoads, Marie E.;
Hoy, Betty L.;
LeBoffe, Joseph M.;
Kissinger, Doris A.;
Tornetta, Thomas;
Fenstermacher, Marjorie A.;
Kriwasch, Arlene;
Caldwell, Margaret E.;
Hunsicker, Paul:

The Honorable Richard H. Thornburgh and Marie Rhoads, Betty L. Hoy, Joseph M. LeBoffe, Doris A. Kissinger, Thomas

Tornetta, Marjorie A. Fenstermacher,
Arlene W. Kriwasch, Margaret E.
Caldwell and Paul Hunsicker,

Appellants.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 79-3431)

Argued
August 4, 1981
Before: ALDISERT and WEIS, *Circuit Judges*, and
RE, *Chief Judge*.*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.[1]

Costs taxed against appellants.

BY THE COURT,

Circuit Judge

* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

[1]Judge Aldisert joins in this judgment order only because as a member of an inferior court in a judicial hierarchy he is bound to respect the decisions of the Supreme Court of the United States. In his own view, *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), were wrongly decided. For his views *see Loughney v. Hickey*, 635 F.2d 1063, 1065-71 (3d Cir. 1980) (Aldisert, J., concurring).

Attest:

Sally Mrvos, Clerk

DATED: Aug. 4, 1981

CHAPTER 2.—REGISTRATION OF VITAL STATISTICS

VITAL STATISTICS LAW OF 1953

ARTICLE I. GENERAL PROVISIONS

Sec.

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ARTICLE I. GENERAL PROVISIONS

§ 450.101. General provisions: short title

The short title of this act is the "Vital Statistics Law of 1953".

§ 450.102. General provisions: effective date

The provisions of this act shall become effective immediately upon final enactment.

§ 450.103. General provisions: saving clause

The provisions of this act, so far as they are the same as those of acts repealed by this act, are intended as a continuation of such acts and not as new enactments. The provisions of this act shall not affect anything done under the authority of such repealed acts prior to the effective date of this act. All regulations and rules made pursuant to any act repealed by this act shall continue in force until changed by the proper authority named in this act. All certificates and permits actually issued under such repealed acts shall continue in force and effect.

§ 450.104. General provisions: severability

If any provision of this act or the application of any provision to particular circumstances is held invalid, the remainder of the act or the application of such provision to other circumstances shall not be affected.

§ 450.105. General provisions: definitions

As used in this act—

(1) "Department" means the State Department of Health.

(2) "Vital statistics" includes the registration, preparation, transcription, collection, compilation, analysis and preservation of data pertaining to births, adoptions, legitimations, deaths, fetal deaths, marital status and data incidental thereto.

(3) "Live birth" means the expulsion or extraction from its mother of a product of conception, irrespective of the

period of gestation, which shows any evidence of life at any moment after such expulsion or extraction.

(4) "Fetal death" means the expulsion or extraction from its mother of a product of conception after sixteen (16) weeks gestation, which shows no evidence of life after such expulsion or extraction.

(5) "Dead body" means (i) a lifeless human body, or (ii) such parts of a human body as permit a reasonable inference that death has occurred.

(6) "Fetal remains" means the fetus expelled or extracted in the case of a fetal death as defined by this section.

(7) "Person in charge of interment" means any person who places or causes to be placed a dead body or fetal remains in a grave, vault or other receptacle, or otherwise disposes thereof.

(8) "Physician" means (i) a person licensed under the laws of this Commonwealth to engage as a doctor of medicine in the practice of all the branches of medicine, or (ii) a person licensed under the laws of this Commonwealth to engage in the practice of osteopathy or osteopathic surgery.

ARTICLE II. STATE DEPARTMENT OF HEALTH

§ 450.201. Department: general powers and duties

The department shall, pursuant to the provisions of the act, approved the ninth day of April, one thousand nine hundred twenty-nine (Pamphlet Laws 177), as amended, cited as "The Administrative Code of 1929"[1]:

(1) Administer and enforce the provisions of this act and the regulations made pursuant thereto.

(2) Install and maintain a statewide system of vital statistics.

(3) Be the custodian of all vital statistics files and records collected, created or compiled under the provisions of this act.

(4) Have supervisory power over all local registrars appointed under the provisions of this act.

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[1]71 P.S. §51.

§ 450.202. Department: Bureau of Vital Statistics

The Secretary of Health may create, staff and equip a bureau of vital statistics and such other administrative organizations within the department as shall be suitable for the execution of the powers and duties conferred upon the department by this act.

§ 450.203. Department: State Registrar of Vital Statistics

The Secretary of Health may designate the head or chief of a bureau of vital statistics as the State Registrar of Vital Statistics.

§ 450.204 Department: forms

The department shall prescribe the forms for all certificates required by this act. The department may prescribe all other forms necessary for collecting, transcribing, compiling and preserving vital statistics. The department shall include in such forms all standard items which contribute to a uniform comparable nationwide system of vital statistics.

§ 450.205. Department: regulations

The Advisory Health Board shall make and may amend or repeal regulations for the administration of the provisions of this act. The Advisory Health Board may make, amend or repeal regulations for the administration of a uniform efficient statewide system of vital statistics which will protect the public health and preserve the completeness and integrity of vital statistics records.

§ 450.301. Registration districts: creation by department

The department shall divide the Commonwealth from time to time into registration districts which shall conform to political subdivisions or combinations thereof.

§ 450.302. Registration districts: local registrars; appointment and removal of

The Secretary of Health shall appoint a local registrar for each registration district. Each local registrar shall ap-

point a deputy to act in the event of his absence or disability. If the department determines that the proper and efficient administration of a registration district requires additional personnel, the department may appoint one or more assistants. No local registrar, deputy or assistant shall be appointed who does not meet the qualifications prescribed by the Advisory Health Board. The department may at any time remove any local registrar, deputy or assistant for cause. The department may abolish the office of any local registrar in the event that the registration district is combined with another. The department may reduce the number of assistants at any time.

§ 450.303. Registration districts: local registrars' duties

Local registrars shall perform the duties imposed upon them by this act, under and subject to the supervision of the department. Local registrars shall transmit certificates and transcripts to such places and at such times as shall be prescribed by the department.

§ 450.304. Registration districts: local registrars' compensation

Each local registrar shall be paid a fee of one dollar ($1) for each certificate transmitted in accordance with the provisions of this act or for each report of no certificates filed during any calendar month. The Advisory Health Board, by regulation, may establish and from time to time revise, maximum limits upon the aggregate amount of fees to be paid any local registrars during a given period. The fees prescribed by this section shall be paid by the Commonwealth from funds appropriated to the department.

§ 450.305. Registration districts: institutional records required

All superintendents, managers and other persons in charge of hospitals, maternity homes, homes for the aged and public and private institutions to which persons resort for medical care or to which persons are committed by process of law, shall obtain and record as to each inmate, at the time of

his admittance, all personal information required in the certificates prescribed by the department. Each inmate shall supply such information at the time of admittance, but if the inmate is unable personally to supply the information a relative of the inmate or other person acquainted with the facts shall do so.

ARTICLE IV. BIRTH REGISTRATION

§ 450.401. Birth registration: general provisions

A certificate of each birth occurring in this Commonwealth shall be filed with the local registrar of the district in which the birth occurs within a period prescribed by regulations of the Advisory Health Board. The certificate shall be prepared, signed and filed by the attending physician or licensed midwife, except that when there is no attending physician or licensed midwife the certificate shall be prepared, signed and filed (1) by the father, or (2) in the event of his death, disability or absence, by the mother, or (3) in the event of her death or disability, by the householder of the premises or superintendent of the institution in which the birth occurs, or (4) in the event of the absence or disability of all persons heretofore named, then by such person acquainted with the facts as the local registrar shall designate.

§ 450.402. Birth registration: foundling registration

The birth of each child of unknown parentage discovered within this Commonwealth shall be registered on a form prescribed by the department and within such period of time following the discovery of the child as the regulations of the Advisory Health Board shall prescribe. The person in charge of the agency or institution or such other person into whose care the child is first delivered shall file the registration form with the local registrar of the district in which the child is discovered. Such registration shall be acceptable for all purposes in lieu of a certificate of birth.

§ 450.403. Birth registration: children born in a country other than the United States

The department shall, upon request, complete and register birth certificates for any child born in a country other than the United States when either parent is a citizen of the United States and a resident of the Commonwealth of Pennsylvania. Such certificates shall show the true country and date of birth, and that the certificate is not evidence of the United States citizenship of the registrant. For such registration the department shall require proof of parental United States citizenship and of Pennsylvania residence. Certified copies of such certificate shall be issued upon application and payment of the prescribed fee.

§ 450.501. Death and fetal death registration: certificates to be filed

A certificate of each death or fetal death which occurs in this Commonwealth shall be filed within ninety-six (96) hours after the death or fetal death or within ninety-six (96) hours after the finding of a dead body or fetal remains. In every instance, the certificate shall be filed prior to the issuance of a permit for interment or other disposition of the dead body or fetal remains. The person in charge of interment or of removal of the dead body or fetal remains from the registration district shall file the certificate with any local registrar who shall be authorized to issue certified copies of such death.

§ 450.502. Death and fetal death registration: information for certificates

In preparing a certificate of death or fetal death, the person in charge of interment or of removal of a dead body or fetal remains from the registration district shall obtain the required information. The following persons shall supply the information certified by their respective signatures:

(1) Personal information concerning the deceased or the fetal death shall be supplied by the person best acquainted with the facts.

(2) The medical certification except in the event of a referral to the coroner pursuant to section five hundred three of this act,[1] shall be supplied (i) in the case of a death, by the physician or (ii) dentist who is a staff member of an approved

[1]Section 450.503 of this title.

hospital who attended the deceased during the last illness, provided the death occurs in the hospital and the deceased had been admitted on the dental service, and (iii) in the case of a fetal death, by the attending physician.

§ 450.503. Death and fetal death registration: coroner referrals

The local registrar or person in charge of interment or other person having knowledge of the death or fetal death shall refer to the coroner the following cases: (1) where no physician or dentist who is a staff member of an approved hospital was in attendance during the last illness of the deceased or in the case of a fetal death where there was no attending physician, or (2) where the physician or dentist who is a staff member of an approved hospital in attendance during the last illness of the deceased or the attending physician in the case of a fetal death is physically unable to supply the necessary data, or (3) where the circumstances suggest that the death was sudden or violent or suspicious in nature or was the result of other than natural causes. In every instance of a referral under this section, the coroner shall make an immediate investigation and shall supply the necessary data, including the medical certification of the death or fetal death.

§ 450.504. Death and fetal death registration: permits concerning dead bodies and fetal remains

No person shall dispose of a dead body or fetal remains until a local registrar issues a permit therefor. The local registrar shall issue the permit only after the person in charge of interment or removal has filed with the local registrar a certificate of death or fetal death and has complied with all regulations with respect to the issuance of the permit.

The sexton or other person in charge of any premises in which bodies are interred or cremated shall not allow the interment or cremation of any dead body or fetal remains unless a permit issued under this section is presented to him. The sexton or other person in charge of such premises shall indorse upon each permit presented to him the date of

interment or cremation, over his signature, and shall return the permit so indorsed to the local registrar of his district within ten days from the date of interment or cremation.

§ 450.505. Death and fetal death registration: out-of-state permits

When a death or fetal death occurs outside of this Commonwealth and the dead body or fetal remains are accompanied by a permit for burial, removal or other disposition, issued in accordance with the law and regulations in force where the death or fetal death occurred, the permit shall authorize transportation into or through this Commonwealth and burial or other disposition of the dead body or fetal remains within this Commonwealth, without the indorsement of a local registrar of this Commonwealth.

§ 450.506. Death and fetal death registration: regulations concerning dead bodies and fetal remains

The Advisory Health Board shall make and may amend or repeal regulations governing disposal, transportation, interment and disinterment of dead bodies and fetal remains, in order to protect the public health and promote the integrity and efficacy of death and fetal death registration.

ARTICLE VI. CHANGE OF CIVIL STATUS

§ 450.601. Change of civil status: marriage registration

The clerk of orphans' court of every county shall execute transcripts of the marriage license applications for marriages solemnized within this Commonwealth. The department shall prescribe the forms of such transcripts and the forms of marriage license applications. On or before the fifteenth day of each calendar month, each clerk of orphans' court shall transmit to the department the transcripts of all marriage license applications pertaining to the executed marriage license certificates filed with him during the preceding calendar month. The applicants for each marriage license shall, in addition to the fee for the license, pay to the clerk of orphans' court a fee of fifty cents ($.50) for the execution and transmission of the transcript required by this section.

§ 450.602. Change of civil status: court reports

A certificate of each divorce, annulment of marriage, adoption and annulment of adoption decreed or ordered in this Commonwealth shall be transmitted to the department. The prothonotary or the clerk of the orphans' court shall execute each such certificate on a form prescribed by the department. On or before the fifteenth day of each calendar month, the prothonotary or clerk shall transmit to the department the certificates pertaining to divorces, annulments of marriage, adoptions or annulments of adoption decreed or ordered during the preceding calendar month. For each such certificate the prothonotary or clerk shall assess a fee of fifty cents ($.50) as part of the costs of the proceedings had in connection therewith, and shall receive and apply such fee in the same manner and for the same uses as other costs received by him.

§ 450.603. Change of civil status: amendment of birth certificates

(a) Any person born in this Commonwealth (1) whose birth is registered as illegitimate but who is legitimated by the subsequent marriage of his natural parents, or (2) whose parentage is determined by a court of competent jurisdiction, or (3) who is adopted under the laws of this Commonwealth or of any other state or territory of the United States of America, or (4) whose name is changed by order or decree of a court of competent jurisdiction, may request the department to prepare an amended certificate of birth on the basis of proof of the new status.

(b) The person involved if he has attained majority and is not incompetent, or his parent, guardian or legal representative shall file an application making such request and shall submit such proof as the Advisory Health Board may by its regulations require.

(c) After the amended certificate is prepared, any information disclosed from the record shall be from the amended certificate; and access to the original certificate of birth and to the documents of proof on which the amended certificate is

based shall be authorized only upon request of the person involved if he has attained majority and is not incompetent, or upon request of his parent, guardian or legal representative, or upon order of a court of competent jurisdiction.

§ 450.604. Change of civil status: registration of foreign born children adopted in Pennsylvania

For any child born in a foreign country but adopted in Pennsylvania, whose adopting parents are United States citizens and residents of Pennsylvania, the department shall, upon request, complete and register a birth certificate upon receipt of a certified copy of the decree of adoption, together with proof of the date and place of the child's birth. The certificate shall show the new name of the child as specified in the decree of adoption, and such further information concerning the adopting parents as may be necessary to complete the birth certificate. The certificate shall show the true country and date of birth of the child, and that the certificate is not evidence of United States citizenship. Certified copies of such certificates shall be issued upon application and payment of the prescribed fee.

ARTICLE VII. SUBSEQUENT REGISTRATIONS

§ 450.701. Subsequent registrations: supplemental reports on original records

The Advisory Health Board shall adopt regulations for the purpose of obtaining information omitted from original certificates filed with the department. Supplemental reports filed within the time prescribed therefor shall be considered a part of the original record and certificates or records so completed shall not be considered as "delayed," "amended" or "corrected."

§ 450.702. Subsequent registrations: delayed registrations

The acceptance of any vital statistics record after the time prescribed for its filing shall be subject to such regula-

tions as the Advisory Health Board may deem necessary and proper to preserve the integrity of vital statistics records.

§ 450.703. Subsequent registrations: correction of records

The acceptance of an application to correct an alleged error in any certificate or record filed with a local registrar or with the department under this act shall be subject to such regulations as the Advisory Health Board may deem necessary and proper to preserve the integrity of vital statistics records.

§450.801. Records: disclosure in general

The vital statistics records of the department and of local registrars shall not be open to public inspection except as authorized by the provisions of this act and the regulations of the Advisory Health Board. Neither the department nor local registrars shall issue copies of or disclose any vital statistics record or part thereof created under the provisions of this or prior acts except in compliance with the provisions of this act and the regulations of the Advisory Health Board.

§ 450.801a. Records: reports to county registration commissions

The department shall report monthly in writing to the registration commission of each county the deaths of residents of such counties, except residents less than twenty years of age, for the preceding month. Said report shall contain the full name of the decedent, his last address, the date of his birth if available, and the date of his death.

§ 450.802. Records: copies of marriage registration and court report records

The department shall not issue any copies, certified or otherwise, of records heretofore or hereafter transmitted to the department which consist of (1) marriage license certificates or transcripts of marriage license records, (2) certificates of court orders or decrees of adoption or annulment of

adoption, or (3) certificates of divorce or annulment of marriage. Persons requiring copies of such records shall apply to the court or county office which issued the order, decree or marriage license upon which any such record is based.

§ 450.803. Records: disclosure of illegitimacy of birth

The department shall issue certified copies of or disclose a record from which illegitimacy of birth can be ascertained only upon (1) an order of a court of competent jurisdiction specifying the record sought and holding that such record is necessary for the determination of personal or property rights, or (2) a finding by an officer of the department designated by the Secretary of Health that the applicant therefor has attained majority and is not incompetent and is the person to whom the record relates or the mother or legal representative of the person to whom the record relates, and further that the information contained in the record is necessary for the determination of personal or property rights.

§ 450.804. Records: disclosure of other records

Except for records described in sections eight hundred two and eight hundred three of this act,[1] the department shall issue certified copies of or disclose a vital statistics record or part thereof if an officer of the department designated by the Secretary of Health finds that the applicant therefor has a direct interest in the content of the record and that the information contained therein is necessary for the determination of personal or property rights.

§ 450.805. Records: disclosure for research purposes

The department may permit the use of vital statistics records or parts thereof for research, subject to strict supervision by the department to insure that the use of the records is limited to research purposes.

§ 450.806. Records: disclosure to Governmental Agencies

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[1]Sections 450.802, 450.803 of this title.

The department may disclose information or data from vital statistics records to federal, state or municipal agencies of government which request such information or data in the interest of conduct of official duty.

§ 450.806a. Records: miniature certifications of birth

(a) Upon application therefor and payment of a fee of two dollars ($2), the department shall issue to any person whose original certificate of birth is on file in this Commonwealth a miniature certification of the facts of his birth. Such certification shall be approximately two and one-half inches by four inches in size so that it may be conveniently carried for identification and proof as to age.

(b) Upon application therefor and payment of a fee of two dollars ($2), the department shall issue a regular birth certificate in the name the applicant is actually using upon adequate proof demonstrating the use of the name for fifteen (15) years or more, except in the case of children under fifteen (15) years of age. Adequate proof shall consist of any one of the following: baptism certificate or other verified church records, insurance policy, school record, working papers, armed service discharge papers or marriage license which document shall have originally been issued at least fifteen (15) years prior to the application for a birth certificate under this subsection.

§ 450.807. Records: fees for copies

(a) Except as otherwise provided in this act, the Advisory Health Board shall prescribe the fees to be paid by applicants for copies of vital statistics records or parts thereof.

(b) Federal, state and municipal agencies of government may obtain copies of records or certifications of data from records without payment of fees, provided that the department and the Commonwealth incur no expense in connection therewith.

(c) No fee shall be charged for certified copies of records or parts thereof furnished members of the armed forces of

the United States and their dependents during their term of active service and after their death in service or honorable discharge therefrom.

§ 450.808. Records: accounting for fees

The department shall keep an account of all fees received by it pursuant to the provisions of this act and shall deliver the same to the State Treasurer through the Department of Revenue. Fees received by local registrars for the issuance of certified copies of original certificates of death pursuant to section eight hundred nine of this act[1] shall not be subject to accounting by the department.

§ 450.809. Records: disclosure by local registrars

(a) The Advisory Health Board shall by regulations not in conflict with the provisions of this act prescribe the manner and extent to which local registrars shall disclose vital statistics records.

(b) Subject to the approval of the Advisory Health Board, the department may authorize any local registrar to issue certified copies of original certificates of death or parts thereof which are in his possession, but in every instance local registrars shall transmit the original certificates of death to the department in accordance with the rules and orders of the department. Any local registrar who issues a certified copy of an original certificate of death in accordance with the provisions of this section shall receive therefor a fee prescribed by the Advisory Health Board, not exceeding the fee charged by the department for a like service, to be paid by the person applying for the certified copy.

§ 450.810. Records: evidentiary sufficiency

Any record or duly certified copy of a record or part thereof which is (1) filed with the department in accordance with the provisions of this act and the regulations of the Advisory Health Board and which (2) is not a "delayed"

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[1]Section 450.809 of this title.

record filed under section seven hundred two of this act[1] or a record "corrected" under section seven hundred three of this act[2] shall constitute prima facie evidence of its contents, except that in any proceeding in which paternity is controverted and which affects the interests of an alleged father or his successors in interest no record or part thereof shall constitute prima facie evidence of paternity unless the alleged father is the husband of the mother of the child.

ARTICLE IX. PENALTIES

§ 450.901. Penalties: general provisions

Except where a different penalty is provided by this act,[1] any person who violates any of the provisions of this act or regulations made thereunder or neglects or refuses to perform any of the duties imposed upon him by this act or regulations made thereunder shall, for every such offense, upon conviction thereof in a summary proceeding before any magistrate, alderman or justice of the peace in the county wherein the offense was committed, be sentenced to pay a fine of not less than fifty dollars ($50) and not more than three hundred dollars ($300), together with costs, and in default of payment of the fine and costs, to be imprisoned in the county jail for a period not to exceed thirty (30) days.

§ 450.902. Penalties: misdemeanors

Any person (1) who wilfully and knowingly furnishes false information for inclusion in any certificate or record provided for by this act, or (2) who wilfully makes or alters any certificate or record provided for by this act in violation of the provisions of this act or regulations made thereunder, or (3) who wilfully discloses or aids, assists, abets or induces any other person to disclose any information contained in vital statistics records in violation of the provisions of this act or regulations made thereunder, shall be guilty of a misdemeanor, and, upon conviction for any of the offenses

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[1]Section 450.702 of this title.
[2]Section 450.703 of this title.

specified in this section, shall be sentenced to pay a fine of not more than one thousand dollars ($1000) or undergo an imprisonment of not more than six (6) months, or both, at the discretion of the court.

ARTICLE X. REPEALS

§ 450.1001. Repeals: specific repeals

The following acts and parts of acts and all amendments of each are hereby repealed:

§ 450.1002. Repeals: general repealer

All other acts and parts of acts inconsistent herewith are hereby repealed.

§ 450.1003. Repeals: acts expressly saved from repeal

This act shall not repeal or modify any of the provisions of the following acts:

STATE SYSTEM OF REGISTRATION

§§ 451 to 474. Repealed. 1953, June 29, P.L. 304, art. X, § 1001

§ 475. Cities of first class; fees for certified copies and searches

Whenever the local authorities in any city of the first class shall on request furnish any applicant a certified copy of the record of any birth, death or marriage which birth, death or marriage shall have been registered in the office of such local authorities prior to the taking effect of the act, approved June seventh, one thousand nine hundred fifteen (Pamphlet Laws, nine hundred),[1] entitled, "An act to provide for the immediate registration of all births and deaths throughout the Commonwealth of Pennsylvania, by means of certificates of births and deaths, and burial or removal permits; requiring

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[1]Sections 451 to 474 of this title, repealed.

prompt returns to the Central Bureau of Vital Statistics, as required to be established by the State Department of Health; and, in order to secure prompt and faithful registration of births, marriages, deaths, and diseases, of practitioners of medicine and surgery, of midwives, nurses, and undertakers, and of all persons whose occupation is deemed to be of importance in obtaining complete registration of births, deaths, marriages, and diseases throughout the State, as provided in section ten of an act,[2] entitled 'An act creating the Department of Health and defining its powers and duties,' approved the twenty-seventh day of April, nineteen hundred and five, and providing penalties for violations of this act," the fee to be charged for the furnishing of such certified copy shall be one (1) dollar, and for any search of the files and records, when no certified copy is requested, the fee to be charged by such local authorities shall be fifty (50) cents for each hour or fractional hour of time of search, to be paid by the applicant. All such fees shall be paid into the treasury of such city.

§ 476. Cities of first class; free copies of death, birth or marriage certificates to be disabled war veterans and dependents

Whenever application shall be made in cities of the first class of this Commonwealth to the proper city, or county officers, by or on behalf of any disabled war veteran of any war in which the United States has been, is now, or shall hereafter be engaged, or by or on behalf of any dependent of any such veteran, for a certified copy of any death, birth, or marriage certificate for use in connection with any claim for death benefits and compensation allowance, it shall be the duty of such officer to furnish such certified copy free of any charge therefor.

DELAYED RECORD OF BIRTH

§§ 481 to 486. Repealed. 1953, June 29, P.L. 304, art. X, § 1001

[2]71 P.S. § 1405, repealed.

RECORDING BIRTH OR CORRECTING RECORD OF BIRTH IN ORPHAN'S COURT

§ 491. Petition to orphans' court; contents; affidavit or affirmation; form of petition and certificate

Any person having been born in the Commonwealth of Pennsylvania prior to January first, one thousand nine hundred and six, whose record of birth is not contained in the records of the orphans' court of the county in which he was born, or whose record of birth is incomplete or incorrect, may have a record of his birth filed and recorded or corrected in the office of the clerk of the orphans' court of the county in which he was born by presenting a petition to said orphans' court, alleging the fact that no record of his birth exists or that said record is incomplete or incorrect and setting forth so much of the following information not supplied cannot be obtained and the reasons therefor:

(a) Place and date of birth, including state, county, city, borough, town, township or village. If in a hospital or other institution, the name of the same shall be given as well as the residence of the parents and the post office address of the parents;

(b) Full name;

(c) Sex;

(d) Whether a twin or other plural birth;

(e) Whether the birth was legitimate or illegitimate;

(f) Full name of father, when legitimate;

(g) Color or race of father;

(h) Birthplace of father and age at birth of applicant, if known;

(i) Occupation of father, if known;

(j) Residence of parents, if living and known;

(k) Occupation;

(l) Maiden name of mother;

(m) Color or race of mother;

(n) Birthplace of mother and age at birth of applicant, if known;

(o) Occupation of mother, if known;

(p) Number of children of this mother, if known, and number of children of this mother now living, if known;

(q) (1) A certificate written in the English language, signed by the doctor or midwife in attendance at the birth of such person, or

(2) A certificate written in the English language, signed by such person, accompanied by a baptismal record kept by a bona fide ecclesiastical body, and certified by a priest, minister or other officer of said body, or, if it is impossible to obtain such records, then an affidavit to that effect by such priest, minister or other officer, or

(3) A certificate written in the English language, signed by such person and by a parent or near relative of such person who has lived with the person or family and has knowledge of the facts contained in such affidavit, or

(4) A certificate written in the English language, signed by such person and by two other persons who have had adequate means of knowledge of the facts contained in such affidavit or of the family tradition thereon: Provided, That such last mentioned persons need not be related by blood or marriage if they have been connected with the family so long and so intimately as to have acquired knowledge of the facts: Provided, however, That if the information required above is not available the court may require such other information, including public or private records, as will satisfy it.

Every certificate filed under this section shall be supported by an affidavit or affirmation on behalf of each person signing the certificate, attesting the correctness of the information given therein, which affidavit or affidavits shall be a part of the record of birth, and a copy of such affidavit or affidavits shall accompany each certified copy of any record of such birth issued by the clerk of the orphans' court. In order that the form of petition in the several counties may be uniform, the Bureau of Vital Statistics of the Department of Health shall prescribe the form of petition and certificate required under section one of this act.

§ 492. Decision and order; fee; masters

Upon presentation of said petition by the clerk of the orphans' court, or after hearing had, the said court, if satisfied of the truth and accuracy of the facts alleged therein, shall order the record of the birth of the petitioner to be filed and recorded and indexed in the office of the clerk of the orphans' court in said county upon the payment of a filing fee of two dollars and fifty cents ($2.50), which payment shall entitle the petitioner to a certified copy of said record.

The orphans' court is hereby authorized to appoint a standing master or masters to whom such petitions may be referred, who shall upon such reference hold the hearing specified in this section and make recommendations to the orphans' court for approval or disapproval of the petition with an appropriate form of decree. Such master or masters shall be paid by the county such compensation as the orphans' court shall fix.

§ 493. Special docket book or register

There shall be provided at the expense of the county a special docket book or register wherein such records of birth shall be duly entered.

§ 494. Records as prima facie evidence

A record of birth so established or a duly certified copy of the same shall be prima facie evidence of all matters therein contained and shall be admissible in all judicial proceedings.

§ 495. Fee for certified copy of record

A certified copy of any such birth record shall be furnished to any applicant upon payment to the clerk of said court of the sum of one dollar ($1).

§ 496. Penalty for false affidavit, statement, record or certification

In addition to any other penalties provided by existing

law, any person who shall make any affidavit, statement, record or certification under the provisions of this act, knowing the same to be false, shall, upon summary conviction therefor, be sentenced to pay a fine of not less than one hundred dollars ($100.00), nor more than three hundred dollars ($300.00), and the cost of prosecution, and, upon failure to pay such fine and costs, shall be imprisoned not more than ninety (90) days.

DIVORCES, ANNULMENTS AND ADOPTIONS, REGISTRATION OF

§§ 501.1 to 501.4. Repealed. 1953, June 29, P.L. 304 art. X, § 1001

UNIFORM VITAL STATISTICS ACT

§§ 505.1 to 505.37. Repealed. 1953, June 29, P.L. 304 art. X, § 1001; 1953, Aug. 22, P.L. 1344, § 24

Opposition

81-823

No. 81-1240

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In The

Supreme Court of the United States

October Term, 1981

THE HON. DICK THORNBURGH, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,

Petitioners,

vs.

MARY McMULLAN, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did Governor Thornburgh's firing of the respondents because they were Democrats, and replacing them with the other petitioners herein (who were selected for their position solely on the basis of their loyalty to the Republican Party and their recommendations from local Republican politicians) constitute a "patronage firing" of the type condemned in *Elrod v. Burns* and *Branti v. Finkel*?

Answered in the affirmative by the court below.

2. Does the finding of the court below, that Governor Thornburgh was motivated by both traditional political patronage considerations and considerations relative to improving his prospects of gaining passage of certain legislation through the Pennsylvania Senate, protect from constitutional challenge for the firings of the respondents, who were admittedly selected for termination solely on the basis of political associations with the Democratic Party?

Answered in the negative by the court below.

3. Was the court below required to find that Governor Thornburgh was motivated by an "invidious, discriminatory purpose" in firing the respondents, in order to grant the respondents relief under *Elrod v. Burns*?

Answered in the negative by the court below.

4. Did a newspaper reporter's testimony on direct examination concerning the accuracy of a newspaper article he had written about an interview with Governor Thornburgh, entitle Governor Thornburgh, under the circumstances presented in this civil action, to compel production of the newspaper reporter's privileged, undisclosed notes?

Answered in the negative by the court below.

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selected for firing solely because of their affiliation with the Democratic Party, and no other conduct or behavior of respondents was considered in reaching the decision to terminate them. 15

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No. 81-1240

In The

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October Term, 1981

THE HON. DICK THORNBURGH, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, et al.

Petitioners,

vs.

MARY McMULLAN, et al.

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF IN OPPOSITION

Respondents Mary McMullan, Angelina Aloi, Doris Burleson, Theresa A. Duffy, Carmel Clay, Molly M. Kavash, Mary H. Nevin and Joann King, respectfully pray that this Court deny the petitioners' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 4, 1981.

STATEMENT OF THE CASE

This action was initially brought by the respondents, eight former state employees, to gain reinstatement to their former positions as Local Registrars of Vital Statistics. Respondents were selected for termination solely because of their affiliation with the Democratic Party.

Local registrars are employees of the Pennsylvania Department of Health who perform clerical work necessary to processing death and birth certificates, including providing interested parties such as next-of-kin with certified copies of death certificates. Local registrars also transmit local statistics on births and deaths within their respective districts to the Pennsylvania Bureau of Vital Statistics on a regular basis. Local registrars also have the responsibility of examining certain portions of death certificates completed by physicians and, based upon the information contained therein, either to issue to the next-of-kin of the deceased person a burial permit, or, in suspicious cases, to notify the local coroner of the possibility of the need for an autopsy or other investigation into the cause of death of the decedent (A45, 76-78, 351, 353, 378-379, 388-389, 391, 412-413, 415, 448-449, 457, 460; E16, 29-30).[1]

Local registrars in most if not all cases work out of their homes (A91, 351, 354, 378). The system of local registrars assigned to 339 local registration districts throughout Pennsylvania and working out of their homes, was designed to allocate the local registrars fairly evenly throughout the state, taking population densities into consideration, so as to make the registrars and their places of business more accessible to the

---

1. References to the evidence before the court below will be to the Appendix (A) and Exhibit Volume (E) filed with the Third Circuit Court of Appeals. References to the opinion of the District Court will be to the opinion as printed in the petition for writ of certiorari (Pet. for Cert.).

citizens of Pennsylvania whom the registrars serve (A45, 90-92; E16). Indeed, several funeral directors testified on behalf of the respondents that the presently existing system of local registrars serves the public well and that the public would suffer a drastic reduction of service under a changed system such as was advanced by Governor Thornburgh as part of his theory of defense in this case (A187, 189-190, 193-194, 196).

Local registrars are compensated on a "piece-work" basis; each registrar receives a prescribed fee for each birth certificate she transmits to the Bureau of Vital Statistics, and for each certified copy of a death certificate which is prepared for funeral directors and next-of-kin (A395; E18, 150). The amount of work available for any given registrar frequently depends upon the presence in his or her registration district of a hospital (increasing the number of birth and death certificates) and nursing and funeral homes (increasing the number of death certificates). Thus, the number of hours worked by and compensation received by each registrar can vary tremendously, as can be seen from Appendix "I" to Governor Thornburgh's Exhibit 1 (E65-92), which sets forth the compensation received by each registrar in the year 1978. Among the respondents in this case, respondent King actually worked few hours per week; respondent McMullan, on the other hand, typically worked in excess of 50 hours per week (A90, 355, 378, 387, 415, 454-455, 458). Indeed, respondents McMullan, Aloi, Kavash, Burleson, Duffy and Clay worked full time and exclusively as local registrars (A76-77, 90-91, 355, 378-379, 391, 415, 449-450, 458-459). All of the respondents, either personally or through their deputies, made themselves available to the public, and especially to funeral directors, for the purpose of issuing burial permits and certified copies of death certificates on a 24-hour-per-day basis (A76-77, 90-91, 355, 378, 455).

Governor Thornburgh has never contended (except in a newspaper article, to be discussed below) that the respondents did not perform their duties as local registrars in a completely adequate and satisfactory manner.

Each of the respondents is a registered Democrat, and each was active to a greater or lesser extent in the affairs of the Democratic Party of Delaware and Montgomery Counties of Pennsylvania (A118-119, 134-135, 210, 385-386, 467-473, 475).

It is not difficult to appreciate the fact that a position as a local registrar would be particularly valuable to a person who was confined to home, whether by the necessities of raising young children or for other reasons. For example, the position enabled respondent Carmel Clay to earn an income in excess of $12,000 per year while remaining at home raising four young grandchildren (A470). Indeed, testimony adduced before the District Court showed that the present local registrar for Upper Darby Township, Marie Rhoads, one of the petitioners herein who was installed by Governor Thornburgh in place of respondent McMullan, has been able to combine her function as local registrar with her function as Secretary to the Upper Darby Township Republican Committee, and is now operating as a local registrar out of the Upper Darby Township Republican Headquarters (A418-420, 433-435).

It was the prospect of dispensing valuable positions as local registrars to loyal Republicans that impelled three influential Republican politicians from Delaware County to go to the State Capitol in early July of 1979 to demand a meeting with Murray Dickman, the deputy executive assistant to Governor Thornburgh (A207, 211). At that meeting there was a discussion concerning the replacing of the local registrars in Delaware County with employees who would be partisans of the Republican Party (A211-214). Within two weeks after this

meeting Governor Thornburgh made the decision to terminate the respondents and certain other Democrat local registrars in Delaware and Montgomery Counties, and to replace them with the individuals who were joined as defendants and appear with Governor Thornburgh before this Honorable Court as petitioners (A47-49, 215-216, 231, 286-287).

In early July, 1979 shortly after the meeting between Dickman and the Republican politicians, Dickman gave an interview to one Harold Ellis, a reporter for the *Delaware County Daily Times*. The interview dealt with the recent visit of the Republican politician to Harrisburg, and with the general question of whether or not Governor Thornburgh was planning a mass firing of the Democrat local registrars, in order to replace them with Republican loyalists. During the course of the interview, Dickman told Ellis that the pivotal question was a legal question of whether local registrars were "independent contractors" as opposed to "employees" (and thereby not protected by this Court's decision in *Elrod v. Burns*, and that this pivotal question had not yet been resolved. This statement was later reported in an article by Ellis in the *Daily Times* on July 7, 1979, and the article was introduced into evidence (A173-174, 232-233; E10).

Sometime before July 18, 1979 Governor Thornburgh reached the decision to terminate the specific respondents herein. In addition to the political input from the Republican politicians described above, Dickman was receiving recommendations from other politicians in the Montgomery County area for appointment of individuals to succeed the respondents from Montgomery County. The recommendations of Republican politicians, in fact, were the sole job criteria considered by Governor Thornburgh in selecting successors to fill the vacancies that were created by the firing of the respondents (A222-225, 246-253).

Between July 18 and August 28, 1979, the machinery to fire the respondents came to a standstill, due to the vacation schedules of Thornburgh Administration officials. Eventually, by letter dated August 28, each of the respondents was notified of her termination and of the identity of her successor, and was instructed to deliver to her successor the accouterments of her office.[2]

Philadelphia and Delaware County newspapers began picking up on the story of the firing of the local registrars

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2. Governor Thornburgh's personnel action of August 28, 1979 had the effect of removing every Democrat local registrar in Delaware and Montgomery Counties who was earning a significant income as a local registrar. The only local registrars in Delaware and Montgomery Counties who were not replaced were:

a. Helen K. Levine, a Democrat who earned $6,757 per year;

b. Gloria Rothwell, a former Democrat who changed her registration to Republican within a month after Governor Thornburgh was elected, earning $14,750 per year;

c. Mary Brady, a Democrat who earned $300 per year;

d. William McMahon, a Republican who earned $4,485 per year;

e. Julia Heid, a Republican who earned $14,209 per year;

f. Sylvia Cichocki, a Democrat who earned $1,980 per year; and

g. Lois O'Brien, a Democrat who earned $3,162 per year (A332, 462-465; E76, 83, Plaintiffs' Exhibit 41).

Indeed, the only local registrar in Delaware County earning a substantial income from her state job who was not replaced by Governor Thornburgh was Gloria Rothwell, who had changed her registration from Democrat to Republican on December 8 or 9, 1978, approximately one month after Governor Thornburgh's election (A332; E76). Gloria Rothwell testified that she changed her registration because she liked Governor Thornburgh and because she "wanted to work in my community [Chester] and I know that in Chester you have to be a Republican" (A343-344). The only local registrar in Montgomery County earning a substantial income from her state job, who was not replaced by Governor Thornburgh, was Julia Heid, a Republican (A746, 780; E83, Plaintiff's Exhibit 41).

shortly after Labor Day. On Wednesday, September 5, Governor Thornburgh gave reporter Harold Ellis of the *Delaware County Daily Times* a telephone interview and made several statements concerning the firing of the respondents, which statements were reported in the *Daily Times* on September 6, 1979:

> "I do not propose to subsidize with public funds the political activity of people [meaning the respondents and the other terminated local registrars] dedicated to undermining this Administration.
>
> [The termination of the respondents and other fired local registrars was not an objectionable patronage action because local registrars] . . .are not employees of the state, they have contracts. . . .It is a little bit different.
>
> Right now we have [as local registrars] mostly active members of the opposite party who are dedicated to undermining this Administration. Rather than subsidize these activities with public funds, we are replacing some of them with qualified Republicans.
>
> There is no constitutional right to hold a contract with the state." (A136-142; E9).

The Thornburgh administration has in fact never had any evidence that any of the respondents or other terminated local registrars were exerting efforts to countermand the administration's efforts or to undermine the administration's function in any way, directly or indirectly (A231).

In the meantime, the Governor's assistant press secretary, Patti McCormack, who was authorized on the occasion to speak on behalf of Governor Thornburgh, gave an interview to reporter Vernon Loeb of the *Philadelphia Inquirer*, the content of which Loeb reported in the *Inquirer* on September 5, 1979. Loeb, who, like Ellis, testified as to the accuracy of the content of his article, reported that McCormack gave the following statement and explanation of the termination of the respondents:

> "The [Thornburgh] Administration was attempting to replace Registrars who do little work [meaning the respondents] with qualified individuals and the Delaware and Montgomery County firings were only the starting point.
>
> The appointment of Republicans in the two suburban Philadelphia counties was consistent with Thornburgh's position that qualified Republicans would receive preference in state hiring." (A306-311; E13).

Reporter Loeb also interviewed Thornburgh aide Murray Dickman, who was quoted in the *Philadelphia Inquirer* on September 9, 1979 as defending the firings in the following manner:

> "What alternative [to firing the respondents and replacing them with Republicans] did we have? It is not our intention to fund either party from the public coffers—and that particularly goes for the Democrats." (A238, 313-315; E12).

In a telephone conversation with respondent Mary McMullen shortly after the respondents were informed of their terminations, Deputy Secretary of Health Emmett Welsh told

her that she had been terminated because she was a Democrat (A94-96).

Sometime in early September, 1979 Dickman and other members of the Thornburgh administration became aware through newspaper articles that the respondents intended to file this lawsuit against the administration to redress grievances arising as a result of their terminations (A300).

On October 2, 1979, in his address to a joint session of the Pennsylvania State Legislature, Governor Thornburgh made the first public statement that the administration intended, as part of the 1979-80 legislative agenda, to introduce legislation reforming the Department of Health (A296-297). Coincidentally with the beginning of the taking of testimony in this case, the Thornburgh administration drafted a piece of legislation which supposedly was aimed at reforming the local registrars' system sometime in early April, 1980 (A582-584). George H. Seidel, Jr., Director of Legislative Relations for Governor Thornburgh, testified that the Thornburgh administration was hoping to motivate an otherwise recalcitrant and Democrat-controlled Pennsylvania State Senate to allow passage of the Governor's reform legislation (which abolishes the position of local registrars and substitutes for it a centralized bureaucracy in Harrisburg) by first firing a good number of the 339 local registrars, most of whom were at the time Democrats. In so doing, so the thinking went, the Democrats in the Senate would no longer have a vested interest in retaining the local registrar system as a source of political patronage. However, Mr. Seidel testified that, *even while* he and the Governor were considering this strategem, they believed that it would only improve the changes of passage of the legislation, and that, even with the strategem, the legislation did not have a "good chance" of passing through the Legislature (A615).

After hearing exhaustive testimony, the District Court, on December 5, 1980, issued a bench opinion in which it determined that the respondents had been terminated in violation of their First Amendment rights. On December 18, 1980, the District Court ordered the respondents reinstated (A909) but stayed the order of reinstatement pending an appeal by Governor Thornburgh (A908). The United States Court of Appeals for the Third Circuit heard argument of the case on August 4, 1981 and ordered the judgment of the District Court affirmed on the same day.

REASONS FOR DENYING THE WRIT

I.

THE COURT BELOW CORRECTLY APPLIED THE FIRST AMENDMENT PRINCIPLES ANNOUNCED IN *ELROD v. BURNS* AND *BRANTI v. FINKEL* IN RULING UNCONSTITUTIONAL THE FIRINGS OF THE RESPONDENTS.

A. The court below correctly concluded that the respondents were discharged unlawfully, notwithstanding its finding that, in firing the respondents, Governor Thornburgh was motivated in part by traditional political patronage considerations, and in part by a desire to reduce the number of Democrats in the Department of Health, thereby removing the incentive of the then Democratic-controlled Pennsylvania Senate to block passage of the Governor's legislation to abolish the position of Local Registrar of Vital Statistics.

In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), this Court held that politically motivated patronage dismissals violate public employees' rights under the First and Fourteenth Amendments. In *Elrod*, this Court

specifically held that a non-policymaking, non-confidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs (427 U.S. at 375). In *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980), this Court reaffirmed *Elrod* and extended its applicability to "policy making" and "confidential" employees that had been expressly excluded from the protection of *Elrod*. This Court said that the hiring authority can fire for politically motivated reasons only if it can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Governor Thornburgh contends that he should be excused from the application of the *Elrod* and *Branti* doctrines because, in firing the respondents, he was not acting out of partisan political concerns, but rather, ". . .was motivated in good faith for the purpose of abolishing the data collection system of which the discharged local registrars were a part" (Pet. for Cert. 6). This argument suffers from factual and legal flaws.

First, the Governor's argument ignores, as it must, the following explicit finding of the District Court:

> "My view of the record—and I find this as a fact—is that the discharges [of the respondents] were discharges which took into account political considerations in the conventional partisan sense but also were perceived by. . .the Governor as a first step in a reform program of substantial dimension.
>
> In saying that the discharges took into account partisan considerations, I mean, of course, that those determining on the discharges were aware of the fact that those being

> discharged were, in the main, Democratic loyalists who were to be replaced by Republican loyalists and that such replacements would clearly be welcomed by local political leaders. In saying that this was also understood by the Governor. . .to be the first step of a major reform program, I mean that the Governor. . .felt in all honesty that an important reform of governmental structure could be facilitated by a process of discharging local registrars, beginning with Democratic office holders." (Pet. for Cert. 10a-11a).

The District Court thus clearly found from the evidence presented to it that both partisan political motivations and reform motivations were "operative" in bringing about the firing of the respondents (Pet. for Cert. 12a).

Secondly, the Governor's argument glosses over the fact that *both* motivating factors—the partisan political motive and the "reform" motive—necessarily begin with the premise that Democrat Local Registrars are to be selected for termination *because* of their affiliations with the Democratic Party. The role of respondents' political party affiliations in the operation of the partisan political motive is obvious. The role of party affiliations in the "reform" motive was described by the District Court in its opinion, as follows:

> "In effect, [the Governor] has urged on this Court in testimony, and defense counsel has placed great weight on this as a matter of defense, it is the position of the Thornburgh Administration that replacing Democratic registrars with Republican registrars will reduce the interest of Democratic legislators in

preserving the existing registrar system since it will, from a Democratic perspective, have lost any particular patronage allure. That accomplishment will, in turn, facilitate, so the contention is, persuading the legislature as a whole to support Governor Thornburgh's intended reform of restructuring the system by abolition of the existing local registrar structure.

In short, the view is that Governor Thornburgh can reasonably rely on the support of legislators of his own party but operates under the constant drum fire of strong Democratic opposition, and particularly in a period when one or another or both chambers of the legislature are in Democratic hands, to reforms which the Governor might not want to undertake. So the strategy here was to reduce any significant political investment which the Democrats might have in the local registrar system and thereby create a situation in which the Governor could count on Democrats to be indifferent and Republicans to be supportive and thereby accomplish his intended reform.

I refer to this at length because, in turn, [respondents] have urged upon me that such a political strategy is a counsel of the most extraordinary political fragility. In effect, the view is: Why should Democratic legislators be dazzled by so obvious a strategem and ultimately lend themselves to a form of political suicide?" (Pet. for Cert. 8a-9a).

Thus, under the theories of *both* motives for firing the respondents, the sole reason for selecting respondents, as opposed to other local registrars, for termination was their Democratic Party affiliation. The factual situation is therefore identical to that presented in *Elrod v. Burns.* Indeed, there are striking and material similarities. For example, Registrar Gloria Rothwell of the City of Chester apparently was *spared* from firing because she had changed her registration from Democratic to Republican—a situation reminiscent of the facts of *Elrod,* where those sheriffs' deputies who changed their political registrations from Republican to Democrat were spared from firing.

The Governor argues that he relied on reports recommending the modification of the local registrar system for economy reasons. The Governor then argues that his firing of the respondents was not political, but rather was justified by reasons of economy. This assertion glosses over the fact that under Pennsylvania law, *legislation,* and not mere executive action, would be required to abolish the positions of local registrars or to centralize the local registrars' functions, as the Governor has attempted to do in his "reform" legislation. Even under the operation of the Governor's "reform" motive, the firing of respondents was not for the purpose of effecting economies; if that were so, then the Governor would not have replaced respondents with the other petitioners herein, who presumably would draw the same fees as respondents for performing the same work as respondents. The respondents were fired, rather, to facilitate the passage of the Governor's "reform" legislation and the respondents were selected for firing because—and only because— they were Democrats.

B. The decision below does not violate principles announced in *Mt. Healthy City Board of Education v. Doyle,* because respondents were selected for firing solely because of their affiliation with the Democratic Party, and no other conduct or behavior of respondents was considered in reaching the decision to terminate them.

Governor Thornburgh's petition for certiorari attempts to misapply this Court's decision in *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), to the case at bar. First, Governor Thornburgh misinterprets the holding of the District Court, by stating, in the language of *Mt. Healthy,* that two reasons played a substantial part in bringing out the respondents' termination: their Democratic Party affiliation and the Governor's desire to reform the vital statistics system. As has been argued at length above, under *both* of these motivations, the actual reason for selecting the respondents for termination was their Democratic Party affiliation.

Secondly, if the test announced in *Mt. Healthy* is applied to the facts of this case, the District Court's finding for the respondents must be affirmed. In *Mt. Healthy,* a school teacher was fired for two separate reasons, one having to do with the exercise of his right of free speech and the other having to do with certain unprotected misbehavior. This Court held that, by focusing on whether the constitutionally flawed reason played a "substantial" part in the decision to terminate the teacher, the District Court may have placed the teacher in a better position than he would have enjoyed, had his constitutional rights not been violated. This Court therefore established a rule involving shifting burdens of proof, which the District Court below held was the rule that governs the decision in this case:

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct

> was constitutionally protected, and that this conduct was a 'substantial factor'—or to put into other words, that it was a 'motivating factor'.[1]

---

1. In the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's employment even in the absence of the protected conduct." (*Mr. Healthy*, 429 U.S. at 287, 97 S. Ct. at 576).

As the District Court below held in this case:

> "The protected conduct in this case is membership in the Democratic Party. It is clear from this record, even on [the Governor's] perception of the fact, that [respondents'] membership in the Democratic Party was an essential ingredient in the decision to discharge. Had the [respondents] not been Democrats, it is clear that the [respondents] would not have been discharged." (Pet. for Cert. 14a).

The court below correctly synthesized the holdings of *Elrod*, *Branti* and *Mt. Healthy* into the following statement:

> "[A] governmental decision to discharge public officials, which takes as its predicate their political affiliation, is one which is inconsistent with the First Amendment." (Pet. for Cert. 17a).

C. *Arlington Heights v. Metropolitan Housing Development Corp.* requires a finding of "invidious discriminatory purpose" only where government action is predicated upon a discriminatory classification which is constitutionally neutral on its face, and therefore does not apply to the present case, involving Republicans discriminating against Democrats.

The Governor's petition for certiorari argues that, because the District Court had "no reason to suppose that the Governor and Mr. Dickman were themselves interested *in any narrow political sense* in interfering with the political activity of the plaintiffs *as individuals,*"[3] and that it "credit[ed] the good faith of the Governor"[4] in desiring ultimately to streamline the vital statistics system, that a finding of purposeful discrimination against the respondents because of their political affiliation is not supported by the record. The Governor is asking this Court to shut its eyes to the other findings of the District Court, which are amply supported by the evidence, that the sole reason for terminating the respondents was their constitutionally protected right to affiliate with their political party. Indeed, perhaps out of concern that the Governor might eventually seize upon the allusion to his "good faith" in the District Court's opinion in an appeal to some higher court, the District Court took pains to make it clear, in a footnote to the phrase, "the good faith of the Governor", that reform was only one of the Governor's animating purposes, and that the court also found "political considerations of the conventional partisan kind" as a factor motivating Governor Thornburgh's behavior (Pet. for Cert. 14a, at Footnote 3). Governor Thornburgh relies for support of his argument on *Tanner v. McCall,* 625 F. 2d 1183 (5th Cir. 1980), *cert. denied,* 101 S. Ct. 1975 (1981). But even the Court of Appeals in *Tanner* concluded that, regardless of proof of motive,

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3. Pet. for Cert. 15a; emphasis added.

4. Pet. for Cert. 14a.

a defendant's ultimate necessary burden in an *Elrod*-type case is to rebut the plaintiff's showing of a constitution deprivation with "sufficient evidence that the same employment decision would have been reached regardless of the constitutionally protected conduct" (*Tanner*, 625 F. 2d at 1190). In other words, in the present case Governor Thornburgh would have had to have proven, even if the respondents had not been affiliated with the Democratic Party, he would have reached the same decision on August 28, 1979 to terminate them. Of course, the record in this case shows that quite the opposite situation is true. Indeed, the record shows that the only local registrars in Delaware and Montgomery Counties who earned fees of any consequence who were spared from termination by Governor Thornburgh were registered Republicans (one of whom changed her registration from Democrat to Republican only a month after Governor Thornburgh was elected, motivated by precisely the kind of patronage-engendered fear which *Elrod* expressly attempted to eliminate) (A332, 343-344; E76, 83; Plaintiff's Exhibit 41).

This Court's holding in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), and in particular, footnote 21 of that opinion, read together with *Mt. Healthy, supra,* simply instructs that, even if the plaintiff in that case, a race discrimination case brought under the authority of the equal protection clause of the Fourteenth Amendment, had been able to prove racially discriminatory purpose, nevertheless the two-part shifting-burden-of-proof test announced in *Mt. Healthy* would allow the defendant the right to establish that the same decision would have been reached even absent a discriminatory purpose. And, as this Court held in *Regents of University of California v. Bakke,* 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), at footnote 27, the requirement of a specific intent to discriminate, required in *Arlington Heights* where the classification on its face was racially (and therefore constitutionally) neutral, has no

application in cases where, as here, the classification is facially discriminatory (as between Democrats and Republicans).

Accordingly, the lower court's finding that the *Mt. Healthy* burden of proof has been sustained should be affirmed.

II.

THERE ARE NO SPECIAL CIRCUMSTANCES PRESENT IN THIS CASE WHICH WOULD HAVE JUSTIFIED THE COURT BELOW IN STRIPPING THE NEWSPAPER REPORTER-WITNESS OF HIS FEDERAL, COMMON LAW AND CONSTITUTIONAL PRIVILEGE COVERING HIS UNDISCLOSED NOTES.

Petitioners have challenged the admission into evidence of the article of September 6, 1979 published by reporter Harold Ellis in the *Delaware County Daily Times,* which reported Ellis' interview with Governor Thornburgh on September 5, 1979. To recapitulate briefly, this is the article in which Governor Thornburgh announced that he did not propose to subsidize with public funds the political activity of the respondents as Democrats; that the firing of the respondents was not an objectionable patronage firing because the respondents were not "employees"; and that it was Thornburgh's intention to replace the respondents with Republicans, rather than finance their activity as Democrats in undermining the administration (E9).

Mr. Ellis authenticated the article in his direct testimony (A138-143). On cross-examination defense counsel immediately requested Mr. Ellis to produce the notes of his conversation with the Governor (A144). Mr. Ellis declined to produce the notes, just as he had done at a previous deposition when faced with an identical request by defense counsel (A149, 154). Defense counsel argued that he could not effectively cross-examine Ellis

on the subject of what the Governor said, and the context in which it was said, without Ellis' notes of the conversation (A156-157). In an effort to allay defense counsel's concerns about the "context" of his client's admitted statements to reporter Ellis, the District Court judge offered to travel to Harrisburg to take the Governor's testimony, or, indeed, to allow the Governor's testimony into the record by deposition, to be conducted at the convenience of the Governor (A156-169, 181-183, 303-305). The Governor himself, as the other person to the conversation with reporter Ellis, was certainly the person in the best position (other than reporter Ellis) to put his own remarks into "context". Nevertheless, defense counsel never availed himself of the judge's generous offer and indeed, apparently never even discussed this offer with Governor Thornburgh (A305).

The District Court, mindful of the possible First Amendment consequences of allowing judicial process to compel the production of a reporter's notes and other resource materials, ruled that petitioner Thornburgh had not exhausted all alternative means of putting his own words into context, and therefore precluded him from delving into Ellis' notes.

The District Court was absolutely correct in denying the Governor access to Ellis' notes. In approaching a problem of this nature, some established principles of First Amendment privilege as applied by the federal courts should be noted. First, the First Amendment provides protection not only to a reporter's undisclosed sources, but also to things like resource materials and materials developed in preparation of a newspaper article, such as the reporter's notes. *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975).

Secondly, the mere fact that the source of a newspaper article is known is irrelevant to the disposition of a claim that the underlying materials need not be produced. *Gulliver's*

Periodicals, Ltd. v. Chas. Levy Circulating Co., Inc., 455 F. Supp. 1197, 1203 (N.D. Ill. 1978); *Loadholtz v. Fields, supra*, 389 F. Supp. at 1300, 1303; *Altemose Construction Co. v. Building & Construction Trades Council of Philadelphia*, 443 F. Supp. 489, 491 (E.D. Pa. 1977).

Thirdly, the First Amendment's protection of a reporter's sources and preparation materials will be accorded more weight in civil proceedings, such as are involved in the instant case, than in criminal proceedings. *United States v. Liddy*, 354 F. Supp. 208, 213 (D.D.C. 1972); *Altemose Construction Co. v. Building & Construction Trades Council of Philadelphia, supra*, 443 F. Supp. at 491.

With the above principles in mind, an evaluation of the Governor's claim should proceed along the lines of the inquiries suggested in exhaustive analysis of the Third Circuit Court of Appeals in the case of *Riley v. City of Chester*, 612 F. 2d 708 (3rd Cir. 1979). *Riley* arose in the context of a civil rights case, in which the plaintiffs sought disclosure of an undisclosed source for a newspaper article. In holding that the plaintiffs had failed to demonstrate a sufficiently compelling interest to override the reporter's constitutional privilege against disclosure, the court noted the following considerations:

> "In considering the applicability of the policies of the privilege in this case, we consider first the circumstances in which the issue arose. This is not a case where the reporter witnessed events which are the subject of Grand Jury investigations into criminal conduct. . .This is not a situation where the reporter is alleged to possess evidence relevant to a criminal investigation. . .This case does not place in apposition the journalist's privilege and the

> constitutional right of a criminal defendant to be afforded every reasonable opportunity to develop and uncover exculpatory information. . .This is not a case where a reporter waived the privilege by filing suit to vindicate his own rights. . .Nor is this a situation in which the journalist and/or publisher are defendants in a suit brought for damages caused by publications alleged to have contained knowing or reckless falsehoods. . .This is simply a situation where a journalist has been called as a witness to a civil suit in which neither she nor her employer has any personal interest. The news stories were concededly written by her in the course of her newspaper employment on matters of public interest. . .In fact, plaintiff and the Trial Court did not claim that the substantive facts alleged in the petitioner's news stories were actually untrue. . .Under the circumstances, plaintiff must demonstrate why his interest in civil litigation. . .is dependent upon the information sought. [*Riley, supra,* 612 F. 2d at 716]".

Each and every one of the seven circumstantial considerations set forth in *Riley,* above, are present in the instant case, and militate against disclosure of reporter Ellis' notes.

The court in *Riley* went on to hold that, in considering this issue, ". . .the federal common law privilege of news writers shall not be breached without a strong showing by those seeking to elicit the information that there is no other source for the information requested. . .The requisite balance cannot be made without a showing 'as to the effort to obtain [the information] from other sources.' " *Riley, supra,* 612 F. 2d at 716, 717. As has already been pointed out above, not only has the Governor

failed to exhaust other possible avenues of obtaining information concerning the context of his remarks; he has failed to even discuss it with his attorney (A305). Furthermore, when confronted with the District Court's ruling precluding access to Mr. Ellis' notes, the Governor failed to take advantage of his opportunity to cross-examine Mr. Ellis concerning the context of his statement, independently of the notes (A176-177). In this respect this case bears similarities to *Riley*. In *Riley*, the Court of Appeals made note of the fact that plaintiff's failure to question the suspected news source, whom plaintiff actually called to the witness stand, concerning whether or not he was in fact the source of the same subject matter with the reporter. Similarly, in this case, since the Governor failed to explore the context of his own remarks either with Mr. Ellis or through his own testimony, he should be precluded from invading Mr. Ellis' First Amendment privilege with regard to his notes. Finally, since the newspaper article itself supplies the context for the Governor's remarks, Ellis' notes would seem to have only marginal relevance and materiality to the Governor's case. *See Riley, supra,* 612 F. 2d at 718.

Governor Thornburgh urges this Court to follow the sentiments announced in Judge Rambo's concurring opinion in *United States v. Criden,* 633 F. 2d 346, at 361 (3rd Cir. 1980), *cert. denied,* 101 S. Ct. 924 (1981), to the effect that, in weighing a reporter's confidentiality privilege, the reporter's "expectation of confidentiality" must be considered. Judge Rambo held, "If that expectation [of confidentiality] no longer exists, I would hold that the [reporter's] privilege no longer exists" (633 F. 2d at 361).

However, applying this standard to the case before us leads to the conclusion that the privilege must be upheld. In the *Criden* case, Judge Rambo held that a reporter's privilege to withhold the identity of a news source evaporated when that

news source himself disclosed in court his contacts with the reporter. In the instant case, on the other hand, reporter Ellis has never disclosed his notes or the content of his notes. He simply confirmed the accuracy of his news story.

As mentioned above, the First Amendment provides protection not only for a reporter's news source, but also for his resource materials, including his notes. The free flow of news and ideas to the public would be blocked if the subjects of news articles were allowed to install themselves as "senior newspaper editors" by being permitted by the courts to review, and second-guess, and challenge, news articles in light of the reporter's underlying notes. In this case, for example, if Ellis were required to produce his notes, it could open the door to challenge by numerous persons, including the Governor himself, of Ellis' failure to include in his news story any material which may be favorable to the challenger but totally irrelevant to the article. If disclosure is ordered in a *single* case, absent the compelling circumstances outlined in *Riley v. City of Chester, supra,* Ellis and other reporters could expect frivolous challengers to their articles delving through their notes as a matter of course. For this reason alone, Ellis' continuing legitimate interest in maintaining the privacy of his notes is apparent.

Finally, even if this Court agreed with the Governor's contention, the remedy requested by the Governor, namely, the striking of Ellis' testimony and the granting of a new trial, would not be warranted. The testimony of Ellis was used to authenticate his two newspaper articles quoting Governor Thornburgh and Murray Dickman, and their statements to the effect that they were justified in terminating the respondents as Democrats and replacing them with qualified Republicans. These newspaper articles are but a fragment of the mass of evidence on the record (including but not limited to the detailed testimony of Mr. Dickman, the numerous exhibits offered, and

the newspaper article quoting the Governor's spokesperson, Patti McCormack) which support the trial court's finding that the respondents were fired because of their affiliation with the Democratic Party. Indeed, the District Court noted that "the position of the defense in this case does not controvert the allegation that the [respondents], and indeed, all other local registrars, discharged pursuant to the letter of August 28, were Democrats, and all their replacements were Republicans. On the contrary, defendant acquiesces in this view of the record, which is essentially indisputable, but argues, as I have tried to indicate, that the political affiliation of those discharged was relevant for the reason, and only for the reason, that the Governor and Mr. Dickman and those others helping the Governor in the management of the State's affairs were undertaking through these initial discharges to launch a process which would bring about the long-term reform of the Registrar system. . . ."

CONCLUSION

For the reasons outlined above, this Honorable Court should deny a writ of certiorari to review the judgment order for the Court of Appeals for the Third Circuit affirming the opinion of the District Court of the Eastern District of Pennsylvania.

Respectfully submitted,

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